Petition

81-1207

Supreme Court, U.S.
FILED
DEC 29 1981
ALEXANDER L. STEVAS,
CLERK

No.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

THE DELTONA CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

* * *

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December, 1981

QUESTIONS PRESENTED

1. Whether the Court of Claims erred in holding that there is no taking when the federal government destroys all economically viable use of a landowner's property, so long as that landowner is left with other nearby property that has economic value.

2. Whether the Court of Claims improperly sanctioned the use of federal wetlands regulations to preserve property by regulation instead of purchase.

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* The caption lists all parties to this action. Pursuant to Rule 28.1, the following is a listing of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of The Deltona Corporation: The Mackle Co., Inc.; Tierra Verde Co.; Spring Hill Realty Co., Inc.

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OCTOBER TERM, 1981

THE DELTONA CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, The Deltona Corporation, respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Claims entered in this proceeding on August 19, 1981.[1]

[1]In this petition, The Deltona Corporation will be referred to as "Deltona." Respondent will be referred to as "the federal government," and the U.S. Army Corps of Engineers, which was the agency acting on behalf of respondent, will be referred to as "the Corps."

OPINIONS BELOW

Trial of this inverse condemnation action, based on federal land-use restrictions, was held from June 2 through June 17, 1980. On November 25, 1980, the Court of Claims trial judge issued his report finding that application of federal regulations to Deltona's real property destroyed all economically viable use of it; interfered with Deltona's reasonable, investment-backed expectations; and, in effect, preserved Deltona's property for public benefit as an adjunct of the nearby Everglades National Park.[2] His order, findings of fact, and conclusion of law are unreported but are reproduced at page A-1 of the separately bound Appendix.[3]

The Court of Claims rejected the trial judge's conclusion of law that there had been a taking and held in favor of the United States. The opinion of the Court of Claims, reported at 657 F.2d 1184, is reproduced at page A-132 of the separately bound Appendix.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1255. The judgment of the Court of Claims was entered August 19, 1981. Deltona's timely motion for rehearing was denied October 2, 1981. This petition for certiorari was filed within ninety (90) days of that date.

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[2]For a map showing the location of the real property at issue in relation to the Everglades National Park and other government lands, see the separate Appendix at A-180.

[3]References to the separate Appendix will be cited as "App. A-____." The trial judge's findings of fact will be cited as "Finding ____." References to the trial transcript will be cited "T. ____." Deltona's trial exhibits will be cited "Pl. Ex. ____."

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following constitutional provisions, statutes, and regulations are involved in this case. Because of their length, the text has been set forth verbatim in the separately bound Appendix at page A-157:

1. United States Constitution, Amendment V.

2. Section 404, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1344 (1976).

3. Section 401, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1341 (1976).

4. Section 10, Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §403.

5. Regulations of Army Corps of Engineers, 33 C.F.R. §209.120 (40 Fed. Reg. 31320) (July 25, 1975).

    a. Definition: "Navigable Waters of the United States," 33 C.F.R. §209.120(d)(1) (40 Fed. Reg. 31324).

    b. Definition: "Navigable Waters," 33 C.F.R. §209.120(d)(2)(i)(b) and (d) (40 Fed. Reg. 31324).

    c. Favorable State Determinations, 33 C.F.R. §209.120(f)(3)(iii) (40 Fed. Reg. 31327).

d. Corps Policy Regarding Wetlands, 33 C.F.R. §209.120(g)(3)(i) and (iv) (40 Fed. Reg. 31328).

STATEMENT OF THE CASE

This case arose because dramatic and far-reaching changes in the federal government's environmental and land-use policies prevented completion of an ongoing development that had been master planned and commenced years before the onset of those policies. In applying such new federal restrictions, the federal government denied permits for two large tracts of land to preserve them in their natural state for the public benefit. This resulted in the prohibition of all reasonable, economically viable use of the real property at issue.

This action is important because the court below held that a claimant is barred from recovering just compensation for property that has been taken, if that claimant owns other nearby property that has some economic value. Factually, this case is also significant because it shows the confiscatory results that can arise when government applies subsequently enacted regulations to a previously started development and, as found by the Court of Claims and the trial judge, substantially interferes with the landowner's "reasonable, investment-backed expectations."[4]

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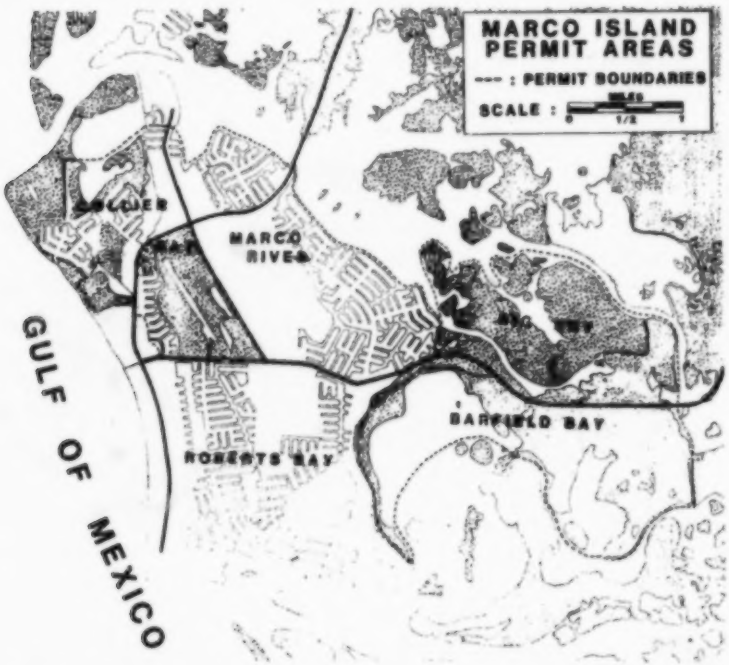
[4]The instant action is markedly different from *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981), *cert. denied*, 50 U.S.L.W. 3441 (Nov. 30, 1981), because *Graham* involved *state* regulations enacted *before* the development was commenced.

A. Nature of the Real Property at Issue

In 1964, Deltona purchased approximately 10,000 acres of coastal land in southwest Florida for the express and, at that time, very reasonable purpose of constructing a master-planned waterfront community called Marco Island. Actual development was phased, and the island was divided into five separate permitting areas. This was done because the whole community could not be built in three years, the duration of Corps permits.



(Pl. Ex. 337)

As shown on the above map, the first three permit areas (called Marco River, Roberts Bay, and Collier Bay), which are now completed, adjoin each other on several thousand acres of land constituting the western part of Marco Island. The last two permit areas—Barfield Bay and Big Key—adjoin each other on the eastern

part of Marco. The Barfield Bay and Big Key permit areas, which the Corps prohibited from development, comprise approximately 2,150 acres of land subject to Corps jurisdiction.[5]

In its permitting process, the Corps treated each of these permit areas as a separate entity. A different permit application was submitted for each separate area, and Corps policy dictated that each permit area be considered on its individual merits. In specific reference to the Barfield Bay and Big Key permit areas now at issue, the Chief of Engineers stated, "Both of these permit applications have been evaluated on their individual merits."

The permits for Barfield Bay and Big Key were denied by the Corps in 1976 to preserve them in their natural state. Because federal regulations compel these permit areas to be kept in their natural state, there is no economically viable use for them, and they are economically valueless and unmarketable.[6] They have

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[5]Barfield Bay and Big Key also contain about 111 acres of uplands that were not within the Corps's jurisdiction and were not included in Deltona's permit applications. Because the Corps has no jurisdiction, these 111 acres could be developed and sold irrespective of Corps permits or requirements; therefore, Deltona claimed no taking of this acreage. It was this acreage outside Corps jurisdiction, however, in addition to other separate lands that had received permits, that the Court of Claims held to be a defense to the Corps's taking of the Barfield Bay and Big Key permit areas.

[6]Deltona's legal theory throughout this litigation has been that all "economically viable use" of its property has been destroyed, under the theory of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 138 (1978), and *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977). Deltona has never asserted, as was mistakenly stated by the Court of Claims, that it is entitled to recovery because it has lost the "highest and best use" of its property.

been effectively acquired for the public not by the constitutional method of fee purchase, but rather by application of federal land-use regulations prohibiting all economic use.

Virtually all the real property at issue is "fast lands," *i.e.*, property landward of the mean high water line. In this case, however, the government has attempted to brand *all* of Deltona's ownership—regardless of its actual nature—as "public waters." (*See, e.g.*, Government's Opening Statement, T. 1386-87, 1389.) Such a description is erroneous. Deltona's property above mean high water is *land*—land that you can walk on and that is covered with a forest of mangrove trees. (*See* photograph of typical mangrove area at Marco, App. A-181.) Because this land contains mangroves and often has wet soil, it was administratively defined by the Corps in 1975 to be "wetlands," and therefore "navigable waters" under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), 33 U.S.C. §1344 (1976). As applied to Deltona's fast lands, the term "navigable waters" is a pure legal fiction: The real property at issue is neither navigable, nor water, nor public. After application of the regulations at issue, the real property at issue has no economic value.

B. Planning of Marco Island

Deltona initiated master planning for Marco Island in 1964, and completed master planning for all permit areas, including Barfield Bay and Big Key, in 1965. The master plan provided for a free-standing community consisting of more than 12,000 single-family homesites, numerous multi-family sites, school and park sites, commercial sites, shopping areas, boating access and beach areas, arterial transportation routes, and other

planned community facilities. (*See* aerial photograph showing typical developed area of Marco, App. A-182.)

Deltona's development plan was typical of coastal development in Florida until the 1970's. From Marco Island's inception, the Corps had detailed knowledge about and made frequent inspections of the development. Federal officials were actually involved in some of the planning of Marco Island,[7] and the development plan was praised by the federal government in 1967 as "a good example of providing the best protective devices for fish and wildlife." Interior Department Memorandum, App. A-168.

C. New, Increasingly Complex and Rigorous Federal Regulations

This case is marked by the rapid expansion of "increasingly complex and rigorous" federal regulations restricting land use, which were applied to Deltona's development many years after its inception. *See Slip Op.* at 5, App. A-138. When Deltona purchased Marco and began making irreversible commitments and financial investments, Corps permits were considered routine, like building permits. The Corps regulated only those activities occurring waterward of mean high water and considered only navigation in granting or denying permits.[8]

Beginning about 1970, the Congress began broadening environmental and land-use restrictions

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[7]Interior Department Memorandum, Pl. Ex. 67, App. A-168; *see* Interior Department Memorandum, Pl. Ex. 87, App. A-169.

[8]The Corps's statutory authority at that time was Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §403.

dramatically.[9] Despite this broadened regulatory authority, however, the Corps did not exercise jurisdiction over fast lands such as those at Barfield Bay and Big Key until mid-1975, when a district court ordered it to do so. *See Natural Resources Defense Council v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975). Accordingly, eleven years after Deltona began Marco, the Corps revised its regulations to include fast lands as "navigable waters" within its jurisdiction under Section 404 of the FWPCA.[10]

D. The Corps's 1969 Authorization for Deltona To Advertise and Offer for Sale the Lands at Issue.

Under Deltona's phased development plans, "Marco River" was the first permit area scheduled for development. All necessary permits for this area, including Corps permits, were obtained in 1964. The second permit area was "Roberts Bay," which received a Corps permit in 1969. During processing of this permit, the Corps required Deltona to provide a detailed written history and status of future sales and development of the entire Marco community.

After several meetings between Deltona and the Secretary of the Army's staff regarding those plans

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[9]In addition to the FWPCA amendments in 1972, Congress enacted the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §1401; the Marine Mammal Protection Act of 1972, 16 U.S.C. §1361; the Coastal Zone Management Act of 1972, 16 U.S.C. §1451; the Endangered Species Act of 1973, 16 U.S.C. §1531; the Flood Disaster Protection Act of 1973, 42 U.S.C. §4001; and the Deep Water Port Act of 1974, 33 U.S.C. §1501.

[10]Only after the Corps held its public hearing on the Barfield Bay and Big Key permit applications on September 2-3, 1975, did EPA promulgate its "Section 404(b) guidelines," which were relied on so heavily by the Chief of Engineers in denying Deltona's permits.

and future sales, the Secretary of the Army's office drafted several conditions in the Roberts Bay permit. The most important of these conditions was Condition "cc," which restricted Deltona's future lot sales to certain areas designated by the Corps. The Barfield Bay and Big Key permit areas—now before the Court—were intentionally designated by the Secretary of the Army's office as parcels Deltona could continue to advertise and offer for sale:

> "Permittee agrees that it will advertise or offer for sale to the general public only parcels of land landward of bulkhead lines that have already been established by the State of Florida . . . and for which a plat and suitable performance bonds have already been filed with the county [*i.e.*, Barfield Bay, Big Key, and Collier Bay]."[11]

The uncontroverted evidence at trial showed that Condition "cc" was reasonably understood to be a recognition that the real property at issue had been platted and bonded and was being sold, and that Deltona was authorized to continue selling in those platted areas (*i.e.*, Barfield Bay and Big Key), but in no other place.[12] From 1969 to date, Deltona has not sold lands

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[11]Inexplicably, the Court of Claims' opinion quoted part of Condition "cc" but failed to mention the language quoted above, *i.e.*, the provision actually authorizing Deltona to advertise and sell lots in the remaining platted and bonded areas of Marco. That passage, however, is critical. *See* App. A-166.

[12]Even the Court of Claims recognized that Deltona had a "reasonable investment-backed expectation with respect to Barfield Bay and Big Key." *Slip Op.* at 13, App. A-150. Condition "bb" advised Deltona "that future applications for a permit or permits in the general area of the proposed work by [Deltona] or others [would not necessarily be] granted." Reading Conditions "bb" and

at Marco other than those authorized by the Corps in Condition "cc."[13]

E. Federal Involvement in State Development Approvals

Believing that the Condition "cc" authorizations had resolved its permitting problems with the federal government, Deltona sought a similar overall resolution with the State of Florida. Federal officials participated extensively in negotiations for an agreement with the State and emphatically urged that the Marco situation be resolved. (*See* App. A-173 to A-178.) A "State Settlement" was entered into by Governor Askew and Deltona, obligating Deltona to convey more than 4,000 acres of preservation land to the State; in return, the State agreed to issue dredge and fill permits for the remainder of the community already platted, including Barfield Bay, Big Key, and Collier Bay.

F. The Corps's Decision Prohibiting Use of the Real Property at Issue

In March of 1973, Deltona filed separate permit applications with the Corps for the Barfield Bay, Big Key, and Collier Bay permit areas. Despite finding there would be no adverse impact on either navigation or water quality, the Corps district engineer recommended

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(Footnote 12 Continued)

"cc" together, Deltona reasonably understood Condition "bb" to mean that it might never receive a permit to develop *other* areas that had not already been platted within the terms of Condition "cc."

[13]The district engineer expressly found that Deltona had complied with all state and federal land-sales regulations.

that the Barfield Bay and Big Key permits be denied because of his determination that Deltona's mangrove lands should be preserved in their natural state.[14]

The Deltona file was then sent to the division engineer in Atlanta, who recommended that all three permits be issued because denial of permits for Barfield Bay and Big Key would "constitute a substantial and unwarranted taking of property rights." (App. A-165) The case next proceeded to the Chief of Engineers, who commended Deltona for its response to the swiftly changing environmental movement (App. A-166), but nevertheless determined that the Barfield Bay and Big Key permit areas should be preserved in their natural state because of "overriding national factors of the public interest."

G. Impact of the Corps's Decision on Deltona's Real Property

The effect of the Corps's decision to preserve the Barfield Bay and Big Key permit areas was to prohibit all economically viable use of the property, render it unmarketable, and push Deltona to the edge of bankruptcy.[15] Maintaining such lands in their natural state for perceived environmental values is the underlying purpose of the federal regulatory program at issue. Counsel for the government even went so far as to instruct its appraiser to assume that "the law prohibits any uses of that property." (T. 2248)

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[14]He also recommended that the Collier Bay permit be issued. *See* selected comments of district engineer at App. A-163.

[15]As a direct result of the denial of permits for the Barfield Bay and Big Key permit areas, Deltona suffered such severe economic injuries that it has simply not received a reasonable, economic return from the Marco development as a whole, including land sales in the other permit areas. Deltona's expenditures for all

Realizing that no reasonable beneficial use could be made of the Barfield Bay and Big Key permit areas, Deltona filed this action under the Tucker Act, 28 U.S.C. §1491, seeking just compensation for a taking by regulation. After a two and one-half week trial, the trial judge found that Deltona was entitled to just compensation for the taking of the real property at issue because:

1. "Deltona made substantial and far-reaching investments . . . with the reasonable expectation that it would be able to complete development of the entire community, including the Barfield Bay and Big Key areas."

2. "Under the particular facts of this case, the economic impact of the application of Federal wetlands regulations and the resulting interference with Deltona's distinct investment-backed expectations have had an unduly harsh impact, not only upon Deltona and its use of its property, but also upon those who purchased the lots from Deltona in expectation of establishing their homes on those lots."

(Footnote 15 Continued)

of Marco through 1976 were about $164,000,000, and it incurred additional direct, identifiable costs of at least $35,600,000 from permit denial. T. 685-88. Its stock plummeted and trading was suspended by the SEC; further, Deltona lost other valuable properties through forced sales, trades, and refunds. *See* Findings 113, 124. And even though transferable development rights (TDRs) might have value in some areas (such as New York City, *see Penn Central*, 438 U.S. at 137), the record herein shows that TDRs in this case were of little if any value because they were unmarketable and too speculative. Findings 158-65.

3. "Under the particular facts of this case, the Federal scheme of wetlands regulations as applied to plaintiff's ongoing development has denied plaintiff all reasonable, economically viable use of its property."

4. "The Government's action, if allowed without compensation, has the effect of compelling Deltona to preserve the real property at issue for public benefit and environmental preservation purposes without compensation." [Trial Judge's Opinion at 102-03, App. A-128-29.]

5. "[D]efendant has, in effect, made the property an adjunct to land it already acquired by eminent domain, namely the Everglades National Park and the National Big Cypress Park, but without compensating Deltona." [Trial Judge's Opinion at 56, App. A-58.]

Although the Court of Claims did not expressly reject the trial judge's findings of fact,[16] it rejected his recommended conclusion of law that Deltona was entitled to just compensation. The court found that because the federal government had left Deltona with some other separate property that had value, there was no taking of the real property at issue.

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[16]The court said, "While the trial judge also made findings of fact, all the findings necessary to the rendering of this decision are contained herein." *Slip Op.* at 1 n.1; App. A-133. The court made no findings as to the Barfield Bay and Big Key permit areas, but rather considered other separate permit areas and the 111 acres outside Corps jurisdiction. Under Court of Claims Rule 147(b), "findings of fact made by the trial judge are presumed to be correct," and they are entitled to "great weight." *See Eastern School v. United States*, 381 F.2d 421, 435 (Ct. Cl. 1967).

REASONS FOR ALLOWANCE OF THE WRIT

The decision below conflicts with the principle set forth in the Ninth Circuit's decision in *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981), to the effect that the fact that a claimant owns other adjoining property which has value does not bar recovery of just compensation for destruction of the use and value of separate land. That principle is also obviously assumed in a number of decisions of this Court.

The question whether the federal government can take a separable part of a large area without paying for it because other parts of the area that are not taken retain some economic value, presents a question of obvious general importance. If allowed to stand, the Court of Claims' holding will significantly alter the logic and fairness of the developing body of inverse condemnation law.

I.

The Court Of Claims Erroneously Held That There Is No Taking When All Economically Viable Use Of Land Is Destroyed, So Long As The Landowner Retains Other Separable Land That Has Economic Value

In denying compensation to Deltona for a taking of its 2,150 acres of land in the Barfield Bay and Big Key permit areas, the Court of Claims held that inverse condemnation will not lie if a claimant owns any other separable property that retains economic value. The injustice of allowing some property to be confiscated without payment solely because a person also owns other property, is clear. The court below mistakenly

relied on a factually distinguishable case, and its holding conflicts in principle with a recent Ninth Circuit decision and is contrary to several decisions of this Court.

A. The Court of Claims' Decision Conflicts with the Principle Set Forth in a Recent Decision of the Ninth Circuit

The Court of Claims' erred when it held that there can be no taking of separable property where the landowner owns any other property with value. In his classic article on inverse condemnation, Professor Michelman addressed the question as to whether one "property" could be geographically divided into separate parcels for taking purposes:

> "Let us suppose that I own a tract of unimproved land. Is the land necessarily one 'thing' for this purpose, or might it be several? Can it, for example, ever be regarded as geographically divided into more than one thing? Evidently, it can be; for, if we imagine government's practically forbidding me any use of a geographically determined quarter of my farm, it is not likely that the obligation to compensate can be escaped by the argument that only a quarter of the value of the 'thing' has been destroyed."[17]

Professor Michelman's conclusion that property can be geographically divided is inescapable because to deny payment for the taking of one tract of land simply because other parcels supposedly retain value contravenes

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[17]Michelman, *Property, Utility, and Fairness: Comments On The Ethical Foundations Of "Just Compensation" Law*, 80 Harv.L.Rev. 1165, 1192-93 (1967).

the most basic notions of justice and fairness. That, however, is precisely what the Court of Claims did below.

Furthermore, the Court of Claims' holding that all property ownership—even separable tracts that have been treated differently—must be considered in a taking case, also conflicts with the principle announced by the Ninth Circuit Court of Appeals in *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981). In *American Savings*, the claimant owned two contiguous parcels of land: one, a twenty-acre tract called "the Point"; the other, a forty-eight acre tract called "the Spit." In 1974, the county down-zoned the Spit to one multiple residential unit per five acres and rezoned the Point to four multiple residential units per acre. The landowner sued for a taking of the 48 acre Spit. Although conceding that the Point had not been taken because it could be economically developed, the landowner maintained that there was no economically feasible use for the adjoining Spit. The district court, like the Court of Claims below, held the two adjoining properties to be a single parcel for taking purposes and found no taking.

On appeal, the Ninth Circuit reversed and determined that a taking will not be barred merely because the claimant owns adjoining tracts of land. Because *American Savings* involved two adjoining parcels that had been treated separately by the government, the Ninth Circuit distinguished *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which involved the claimant's attempted division of air and surface rights in one city block that had been treated uniformly by the government:

> "In *Penn Central*, the Landmarks Preservation Commission declined to permit a proposed building over the plaintiff's entire property. The challenged government action had not divided the property into discrete segments, and the courts refused to do so. The question here is whether the challenged ordinance creates two separate parcels for taking purposes by adopting different zoning designations for each parcel."[18]

In Deltona's case, the Barfield Bay and Big Key permit areas were treated as separate parcels by the Corps—each had a separate permit application and each was considered on its individual merits. Under *American Savings*, therefore, properties adjoining Barfield Bay and Big Key should not be included in a taking analysis.

The Court of Claims' decision that a taking is barred when the claimant owns other separable property, was mistakenly based on *Penn Central*, 438 U.S. at 130-31. In *Penn Central*, the "discrete segments" this Court refused to separate were the surface rights and air rights in one city block, not (as in Deltona's case) all rights in several large and physically distinct tracts of land. The company in *Penn Central* sought to distinguish between surface and air rights in a small parcel that had been treated uniformly by the city's landmark designation law, *i.e.*, the Landmarks Commission refused to permit certain construction above the company's entire property (the city tax block containing Grand

[18] 653 F.2d at 369-70. The claimant had not yet submitted specific development plans, so the court could not determine whether the county would in fact treat the Point and Spit separately. *Id.* at 372. The case was therefore reversed and remanded.

Central Station). The Court held no taking had occurred because the company was receiving a reasonable economic return from Grand Central Station.[19] The Court also stated that the company might still be allowed to develop some portion of the air rights above the Terminal because the record did not suggest that *no* construction would be allowed.[20]

Conversely, Deltona's case concerns not simply air and surface rights in a city block, but large, physically distinct tracts of land that have been treated separately and differently by the Corps. Unlike Grand Central Station, there is *no* economic use, let alone a reasonable return, for the Barfield Bay and Big Key permit areas. Thus, *Penn Central* was misapplied in this case. The fact that other areas owned by Deltona supposedly have economic value is no bar to recovery for the destruction of all use of the separable Barfield Bay and Big Key permit areas.

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[19]438 U.S. at 137. The Court added that if the company could show there was no economically viable use of the Terminal in the future, a taking might be found. *Id.* at 137, n.36. It is noteworthy that although Penn Central owned other separate properties near Grand Central Station (five hotels, several office buildings, and the Yale Club, *see id.* at 115), this Court did not consider them in its taking analysis.

[20]The existence of specific development plans in Deltona's case distinguishes it from *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Unlike Deltona, the *Agins* landowners never even submitted an actual development plan for approval, and they did not spend 12 years attempting to get final development approvals. *Agins* thus represented merely a taking challenge to the local ordinance on its face. *Id.* at 260.

B. The Court of Claims' Decision Is Contrary to Several Decisions of This Court

Although this Court has not expressly addressed the question as to when two parcels should be considered separately for taking purposes, the Court of Claims' decision is at least implicitly inconsistent with several Supreme Court decisions, including that last Term in *San Diego Gas & Electric Company v. City of San Diego*, ____ U.S. ____, 101 S.Ct. 1287 (1981). The claimant in *San Diego Gas* acquired 412 acres of land in 1966 for possible development in the 1980's; approximately 214 acres of this area was located in or near an estuary.

In 1967, San Diego adopted a master plan designating the entire 412 acres as industrial. Several years later, however, the city down-zoned 39 acres from industrial to agricultural use and redesignated another 233 acres as "open space." The landowner sued for a taking of 214 acres of its land, even though it owned 412 contiguous acres, because the use of those 214 acres had allegedly been destroyed by the zoning ordinance. The Court noted these facts and expressly noted that the rest of the 412 acres had been sold or developed. *Id.* at 1289-90. It is implicit in *San Diego Gas* that a claimant may use or sell portions of a tract of land and still assert a taking of other portions of that tract.[21]

Similarly, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), shows that it is not necessary to consider *all*

[21]The majority did not reach the taking issue, because the Court lacked jurisdiction over the case for the absence of a final judgment. A four-member dissent also accepted the landowner's description of the "taken" property and found a taking by regulation on the merits; Justice Rehnquist concurred in the majority opinion as to jurisdiction, but agreed "with much of what is said in the dissenting opinion." 101 S.Ct. at 1294.

property ownership in a taking action. In *Kaiser Aetna*, the Corps tried to create a public aquatic park by forcing the developer of a residential community to allow public access to the development's private marina. The marina was located in a 523 acre pond that historically had been considered private property. Although the developer owned and had already developed several thousand acres around the pond, it claimed a taking of only the 523 acre pond. This Court recognized the ownership of the entire development, but addressed the taking issue only with respect to the pond. The Court found the Corps's actions toward the pond would amount to a taking. Unlike the Court of Claims below, this Court did not hold that there was not a taking because the claimant owned and had developed other lands in the same development.

The Court of Claims' error is also apparent from *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), involving a due process challenge to a zoning ordinance. The *Nectow* landowner owned a tract of land containing 140,000 square feet. Of that total, 29,000 square feet were zoned residential, with business and industry excluded; the remainder was unrestricted. The special master below found that no practical use could be made of the property zoned residential because no adequate return on investment was possible. The Court considered the 29,000 square feet of land as the "locus in question," and, because the zoning ordinance had destroyed their use, the Court invalidated the ordinance, even though the remainder of the property apparently had economic value.

Deltona finds itself in the same position as Professor Michelman's farmer, who lost a quarter of his farm to the government. The Barfield Bay and Big Key permit areas have been preserved in their natural state for

the benefit of the public. The Court of Claims, however, held that there is no taking if a landowner retains any other land of value. If not corrected by this Court, the Court of Claims' decision will adversely affect taking law and will have impacts well beyond Deltona's mangrove lands in Florida. Deltona therefore respectfully requests that a writ of certiorari issue to review the decision of the Court of Claims below.

II.

The Court Of Claims Improperly Sanctioned The Use Of Federal Wetlands Regulations To Preserve Property By Regulation Instead Of Purchase

It is difficult, if not impossible, to distinguish between the Corps's purpose in preserving Deltona's environmentally valuable land by regulation, and the federal government's program to preserve several hundred thousand acres of similar environmentally valuable lands in the nearby Big Cypress National Preserve by purchase.[22] The only difference is the method of preservation: purchase of the fee in the Big Cypress versus uncompensated regulation in the mangrove lands at Marco. Deltona has suffered a loss of all economic use of its property. But unlike its neighbors owning land in areas purchased by Congress, Deltona has received nothing for the taking of its land by regulation. Such consequences are clearly inconsistent with the justice

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[22]Big Cypress, 16 U.S.C. §698(f). Congress has specifically designated numerous coastal areas having environmental values comparable to Marco as national parks or wetlands preserves and has compensated affected landowners. *E.g.* Cape Hatteras; 16 U.S.C. §459(a); Cape Cod, 16 U.S.C. §459(b); and Point Reyes, 16 U.S.C. §459(c).

and fairness guarantee of the Fifth Amendment. *See Armstrong v. United States*, 364 U.S. 40, 48-49 (1960).

This action, in many ways, is quite similar to *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), in which the Corps sought to impose broad federal powers on a previously started development in order to require public access. This Court held that such federal actions would destroy a fundamental property right—the right to exclude others— and would amount to a taking. Deltona's taking case is even more compelling than *Kaiser Aetna* because the federal regulations in Deltona's case go farther than destroying merely the right to exclude: The federal regulatory scheme applied in this case extinguishes all reasonable, economically viable use of the real property at issue and in fact has been used as an alternative to purchase for the outright preservation of property for the public benefit.

Denial of Deltona's permits was based on a desire to preserve Deltona's mangrove lands. It was not based on the protection of navigation, because the development of Barfield Bay and Big Key would have enhanced navigation. Likewise, the decision was not based on any potential for adverse impacts to water quality. The district engineer expressly acknowledged that water quality was not a problem, and the State of Florida certified that Deltona would comply with applicable water quality standards under Section 401 of the FWPCA.

In Deltona's case, the Corps made a specific land-use decision that residential housing—the purpose for which the property was purchased, master planned, and platted in the mid 1960's—was an inappropriate use of such lands in 1976, and that they should be

preserved in their natural state.[23] Under these circumstances, it can be seen that the federal government intentionally used its regulatory program to avoid the expense of fee acquisition by purchase. The trial judge so found:

> Denial of dredge and fill permits by the Corps has been employed as a means of conserving mangrove growth for the public benefit without acquisition of title to the property." [Finding #141]

More important, the Corps has expressly admitted that the Section 404 wetlands program can be used as an alternative to fee acquisition. In a 1979 General Accounting Office report, the Comptroller General criticized the Park Service's purchase of 570,000 acres of swampland in the Big Cypress preserve near Marco Island, because:

> "[T]he Park Service could protect this swampland through the Federal Water Pollution Control Act of 1972 which prohibits putting dredged or fill material into a water without aurthorization from the Army Corps of Engineers . . . . *Corps officials stated there was certainly the potential to use the permit program as an alternative to fee acquisition while still preventing development or damage to the resource.*" [Report by the Comptroller General, *The Federal Drive To Acquire Private Lands*

[23] *See Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970), in which a taking was found where the federal government similarly prevented private use of lands, to incorporate them into the Point Reyes National Seashore. *See also* vegetation and land-use map showing similarity of the real property at issue to surrounding areas, App. A-179.

Should Be Reassessed, CED 80-14, at p. 54, December 14, 1979; Pl. Ex. 355 (Emphasis supplied)]

Using its permit program as an alternative to purchase is exactly what the Corps has done at Marco. The imposition of such severe restrictions on property in order to create a public benefit, however, clearly places a disproportionate share of the "public burdens" on a single landowner.[24] The trial judge recognized this inequity:

> "[D]efendant has, in effect, made the property an *adjunct* to land it already acquired by eminent domain, namely the Everglades National Park and the National Big Cypress Park, but without compensating Deltona." [Trial Judge's Opinion at 56, App. A-58, emphasis supplied.]

The Court of Claims, on the other hand, in denying compensation to Deltona, has allowed the Barfield Bay and Big Key permit areas to be preserved in their natural state for the public benefit. The federal government's use of its wetlands regulatory program as an alternative to purchase of lands for the public benefit clearly contravenes the justice and fairness guarantee of the Fifth Amendment.

CONCLUSION

The special significance of the protection afforded to property rights by the Constitution was explained by this Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972):

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[24]*See Penn Central*, 438 U.S. at 124; Dunham, *A Legal and Economic Basis for City Planning*, 58 Col.L.Rev. 650, 665 (1958).

> "[T]he [supposed] dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."

Absent review by this Court, the decision below will erode those constitutionally protected rights and distort the developing body of inverse condemnation law.

For the foregoing reasons, Deltona respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Claims.

Respectfully submitted,

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December, 1981

Appendix

Office - Supreme Court, U.S.
FILED
DEC 29 1981
ALEXANDER L. STEVAS
CLERK

No. 81-1207

in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

THE DELTONA CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Received DEC. 1 1980
Peeples, Earl, Smith, Moore & Blank, P.A.

IN THE UNITED STATES
COURT OF CLAIMS

TRIAL DIVISION

No. 370-76

(Filed: November 25, 1980)

THE DELTONA CORPORATION

vs.

THE UNITED STATES

Taking, Inverse Condemnation; Dredge and Fill Permits; Corps of Engineers and EPA Jurisdiction; Commerce Clause; Eminent Domain; Preservation or Conservation (Ecological) Easement; Highest and Best Use; Public (National) Interest Versus Private Property Right

William L. Earl, attorney of record, for plaintiff.

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William Butler, counsel for The Environmental Defense Fund, Inc., National Audubon Society, Inc., Florida Audubon Society, Inc., and Collier County Conservancy, Inc., *amicus curiae*.

OPINION*

BROWNE, *Trial Judge:* This is an action by The Deltona Corporation (Deltona), for recovery of just compensation under the fifth amendment to the Constitution of the United States for defendant's alleged taking, by inverse condemnation, of Deltona's real property as a consequence of the denial by the defendant of Deltona's application for a permit under Section 10 of the River and Harbor Act of 1899 (33 U.S.C. §403) and Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) (33 U.S.C. §1344)[1] to dredge and fill in certain areas owned by Deltona in Collier County, Florida, for the purpose of continuing the development of a partially completed, master planned "finger-fill" or "canalized" residential community known as "Marco Island."

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*The opinion and conclusion of law are submitted in accordance with Rule 134(h).

[1]All references to FWPCA herein refer to the act, as amended in 1972 unless otherwise indicated.

I. Jurisdiction

Jurisdiction of this court is invoked under the provisions of 28 U.S.C. §1491.

II. The Issue[2]

The basic issue presented is whether, as a consequence of implementation by the U.S. Corps of Engineers (the Corps) (in collaboration with the Environmental Protection Agency (EPA) and other Federal agencies) of Section 10 of the River and Harbor Act of 1899, as amended (33 U.S.C. §403) and Section 404 of the Federal Water Pollution Control Act of 1972, as amended (33 U.S.C. 1344) the Federal Government, by the denial of a permit to dredge and fill those areas of Deltona's property which are above, as well as below the mean high water (MHW),[3] has exercised its regulatory authority under the Constitution[4] to such an extent

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[2]This is one of two copending cases in which the same basic issue is raised, the other case being *James J. Jentgen v. United States*, No. 415-77, in which our opinion, findings of fact, and recommended conclusion of law have been filed on even date herewith. The subliminal issue in both cases is whether or not denial of the respective applications for dredge and fill permits has, in effect, made the respective properties satellite annexes to the Everglades National Park and the Big Cypress Preserve without compensating the owners for the property affected by the denial.

[3]Mean high water (MHW) is an abstract term applied to the arithmetic mean of the highest deviation above mean sea level which each highest tide has reached at a given location each day over a period of 18.6 years, thus averaging out variations in tidal data from day to day, month to month, and year to year over the 18.6-year cycle required for the earth and the moon to return to their same relative positions in the lunar system.

[4]Constitution of the United States, article I, section 8 (commerce clause).

that Deltona's property has been taken without compensation or the value thereof has been so substantially diminished that it has been deprived of the right to make the highest and best use of its property.

Determination of the quantum of recovery, if any, has been reserved for further proceedings under Rule 131(c), pending final determination of the issue of liability.

We hold for the plaintiff, Deltona. The basis for our holding is set forth hereinafter.

III. Description of the Property

Deltona purchased a large area of approximately 10,000 acres of uplands, bay bottom, and beach front property in Collier County, Florida, about 10 miles south of Naples, Florida, in June 1964 at a cost of approximately $7,500,000. The property was purchased for the purpose of developing a water-oriented residential community. A master plan was developed providing for a self-sustaining community of 12,000 single-family homes and some multifamily structures with school, park, commercial, and recreational sites, as well as the necessary utilities to serve the needs of the community.

The plan divided the area into five sections, the development of which was to be phased over a period of 15-20 years beginning in 1965. The five areas were named Marco River, Roberts Bay, Collier Bay, Barfield Bay, and Big Key. The master plan was given all necessary local, county, and state approvals in 1965 and 1966, whereupon Deltona proceeded with the development of the first of the five areas, that being the Marco River area. It also proceeded with the offering for sale

and sale of property in all other areas for future development and construction.

A more detailed description of the vegetation and ecology of this area will be dispensed with in this opinion, since it is quite similar to and virtually an extension of the same type of vegetation which grows abundantly in the Everglades National Park and is described more fully in the case of *Jentgen v. United States*, No. 415-77 (opinion reported on even date herewith). However, a reproduction of a National Oceanic and Atmospheric Administration (NOAA) map appears at the end of this opinion as Appendix "A" to give a proper perspective to the area involved in the present case.

Although the undeveloped property in the *Jentgen* case and the property in this case are substantially similar, the nature of the contemplated dredging and filling operations differ substantially. The Jentgen tract was but 100 acres within the city limits of Everglades City, Florida, at the gateway to Everglades National Park, whereas the Barfield Bay and Big Key areas of the Marco Island master-planned community consists of approximately 2,000 acres within an unincorporated portion of Collier County, adjacent the previously developed Marco River and Roberts Bay areas near the Gulf of Mexico. Whereas the Jentgen project would not have involved the construction of canals or "finger-fill" land areas, the Deltona master plan contemplated extensive use of canals and finger-fill areas wherever use of the property could be maximized by such construction. The Jentgen project, on the other hand, contemplated construction of a small marina and three small drainage lakes inland of the shoreline of the

Barron River. The Jentgen project would not require dredging of navigable waters to provide fill. The necessary fill would be obtained by excavating low-lying areas within the property limits and supplementing that material with fill brought in from an inland borrow site. The Deltona project, on the other hand, contemplated use of material dredged from navigable waters, together with other material excavated from the Deltona property or brought in from inland borrow sites to form the navigable canals and to fill the "fingers" upon which homes, roads, and other facilities would be built.

The common denominator in both cases is the denial by the Corps of Engineers of a dredge and fill permit under Section 404 of the Clean Water Act solely on the ground that the dredging and filling, in each case, would result in the permanent removal of a substantial amount of the natural mangrove growth which exists on both properties, thereby reducing or eliminating a source of nutrition for the shell and scale fish which abound in and around the coastal and offshore waters of southwest Florida and the Gulf of Mexico.

IV. Deltona's Development Plans

Deltona's long-range development plan for the Collier Bay, Barfield Bay, and Big Key areas was included in the Marco Island master plan from the outset in 1964-65. The Marco Island area (the first to be developed) was primarily a beach community featuring a hotel and high rise condominiums fronting on the Gulf of Mexico. The Roberts Bay area (the second to be developed), on the other hand, was developed inland of the Gulf Coast between the Marco Island section and the Barfield Bay

section, south of Florida State Road 92. As a consequence of the geography of the inland areas, the "finger-fill" and canalized" plan was used extensively in developing the Roberts Bay section.

When Deltona was ready to proceed with the development of the Collier Bay, Barfield Bay, and Big Key areas, having obtained all necessary state and local permits, it applied for Federal dredge and fill permits for those areas.

The Collier Bay section was located north of the Roberts Bay section, also inland but in the vicinity of the mouth of the Big Marco River. The permit to dredge and fill in the Collier Bay section was granted, notwithstanding the fact that it, too, used the "finger-fill" and "canalized" plan extensively. The permits for the Barfield Bay and Big Key areas, however, were denied.

Collier Bay, itself, is approximately the same size as Roberts Bay but recent (1977) NOAA charts show that depths in the waters in Collier Bay range from 1 or 2 feet to as much as 12 feet. The same charts show no depth for Roberts Bay and 2 to 4-foot depths for Barfield Bay, with many shoals at 1½ feet being reported. The charts show no depths for the waters inland of the Big Key area but navigable channel depths of up to 24 feet are shown in the Big Marco River which flows along the north side of Big Key.

The Big Key section lies northeast of the Barfield Bay section, just across State Road 92 from Barfield Bay. Both the Big Key and Barfield Bay areas may be seen clearly as one crosses the bridge westbound on

State Road 92 over the Big Marco River just north of Goodland Bay and the small community of Goodland.

Although completion of the Big Key and Barfield Bay sections would require removal of most of the mangrove in that area, Deltona will have turned over to the State of Florida for public use more than 4,000 acres of undisturbed property. Deltona would not be opening up a remote virgin area of Collier County, but would merely be extending the development of the Marco River, Roberts Bay, and Collier Bay sections, as originally planned.

The bulkheading of the acreage to be dredged and filled would be comparable to that already installed in the Marco Island and Roberts Bay areas. Likewise, the canals would be comparable in length, width, and depth to those which have already been in use for several years. The method employed in bulkheading contemplates sealing off the construction area from the surrounding navigable waters until the canalizing and finger-filling has been completed. After completion of the canals, a passage is opened to the adjacent navigable waters. In this way siltation of the adjacent navigable waters during construction is reduced to a minimum.

A comprehensive summary of the development plans for all of Deltona's property in the Marco Island vicinity (including Collier Bay, Barfield Bay, and Big Key) was required by the Corps to be submitted within 6 months of the issuance of the Roberts Bay permit,[5] even though the Collier Bay, Barfield Bay, and Big Key

[5]The Roberts Bay permit was issued on December 8, 1969.

permit applications were not yet filed. The required report was submitted to the Corps by letter dated May 18, 1970, well in advance of the due date. It was not until 18 months later, on November 15, 1971, that state permit applications were filed by Deltona as a preliminary step to filing Federal permit applications for the Collier Bay, Barfield Bay, and Big Key area.

The Corps maintained continuing surveillance over the development of the Marco Island project from its beginning in 1965. Deltona, as early as November 25, 1969, furnished the Corps complete plans for development of the entire area, including areas for which additional applications for permits would be filed in the future. The opening paragraph of a letter dated November 25, 1969, to Colonel John T. McElhenny, District Engineer, stated:

> With reference to the pending permit application #67-762 [Roberts Bay] and in anticipation of the filing of additional applications for dredged and fill permits by Marco Island Development Corporation [Deltona], we felt it would be beneficial to set forth in writing, supported by appropriate exhibits, our plans for the development of all of Marco Island and its environs, including lands encompassed by the permit which has been issued [Marco River]; the pending permit application [Roberts Bay]; as well as other lands we intend to develop.

This plan of development was completed and submitted to the Corps long before the 1972 amendments to the FWPCA were passed and almost 6 years before

the Corps and EPA promulgated new guidelines for issuance of dredge and fill permits. The applications for the Barfield Bay and Big Key permits filed in late 1971 (also before enactment of the 1972 amendments to the FWPCA) were consistent with the overall plans disclosed to the Corps in November 1969 and May 1970.

Throughout the planning and development of the entire area, Deltona leaned over backward to accommodate the environmental needs of the public by setting aside preservation areas and deeding large areas of both land and bay bottom to the State of Florida for public use. The State of Florida, on the other hand, conveyed to Deltona some areas to which the State of Florida held title in order that Deltona could fill landward of the previously established and approved bulkhead lines.

In establishing the bulkhead lines, all reasonable means were employed to follow the vegetation line and at the same time following a line approximating MHW in the area. Generally, the deviation from the vegetation line was not more than 50 feet landward or seaward. This method of delineating and reclaiming areas covered by the Swamplands Act of 1850 had been followed in other areas developed in southwest Florida and, therefore, was not unique to the Marco Island area.

Deltona submitted its complete development plans to others besides the Corps. The "Marco Island Conservation Plan," submitted to the Corps in May 1970, was also presented prior to May 18, 1970 to:

State of Florida Trustees of the Internal Development Fund (Messrs. Apthorp, DuBose and Vidzes);

Florida Department of Natural Resources (Messrs. Hodges and Woodburn);

Florida Game and Fresh Water Fish Commission (Dr. Fry); National Audubon Society (Mr. Jack Allen);

University of Miami Marine Lab. (Dr. Durbin Tabb and Mr. Bernard Yokel);

Collier County, Florida (County Manager, Mr. Harmon Turner and County Engineer, Mr. Thomas Peek);

Florida Department of Air and Water Pollution Control (Mr. Nathaniel Reed, Chairman);

Collier County Conservancy (Mr. Joel Kuperberg), and Nature Conservancy (Mr. Ray Dasmann).

A basic principle of the plan was to preserve as much shallow bay-bottom area as possible in its natural, undisturbed state. In doing so, it was estimated that approximately 4,100 acres of privately owned bay bottom and mangrove growth would be dedicated to public ownership in its natural, undisturbed state.

By the time the Barfield Bay and Big Key applications were filed, the Marco River area development had progressed to the point where implementation of the

original plan could be observed and evaluated. It was also evident from sales brochures and advertising that the Barfield Bay and Big Key areas would be developed as "finger-fill" and "canalized" areas in the future. In this respect, the Deltona development is distinguishable from the incipient Jentgen development discussed in *Jentgen v. United States*, No. 415-77 (reported on even date herewith).[6] By the time Deltona filed its Barfield Bay and Big Key applications, its development of the master plan was already partially realized and was not just a speculative matter. Not only had many lots been sold, but also substantial construction had been completed in areas for which permits had been granted.

In its May 1970 report of its future plans, Deltona stated:

> The enclosed plan represents a plan to be carried out over a considerable number of years. It will not all, obviously, be implemented at any one time since the area involved is very large and detailed information will require much field work and consultation. It is anticipated that the corporation will proceed with the implementing of this plan a section at a time so as to be able to properly apply the principles that we feel are desirable.

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[6]The status of the Deltona development is also distinguishable from *Agins et ux., v. City of Tiburon*, 100 S.Ct. 2138 (1980). In that case the property owner had never sought any permits for development of the five-acre tract to which zoning restrictions were applied by the City of Tiburon after the owner had purchased the property. Moreover, after enactment of the ordinance, the city commenced eminent domain proceedings against the property but thereafter abandoned those proceedings.

Many details of the development plans are set forth in the findings of fact which accompany this opinion. Much can also be learned about the geography of the area in relation to the plans from the documentary evidence, such as defendant's Ex. 37 (an aerial photo of the Barfield Bay and Big Key areas), particularly when viewed in conjunction with plaintiff's Exs. 336, 337, and 342, for example.

The economic considerations involved in the development plan are also treated in the findings of fact and need not be elaborated upon in this opinion. Suffice it to say that Deltona, a publicly held corporation, invested millions of its shareholders' dollars and reinvested its earnings in an effort to complete the development which it had reasonably expected to complete in accordance with its master plan. The economic loss which Deltona will suffer by denial of the Barfield Bay and Big Key permits cannot be determined with any degree of accuracy at this stage of the litigation. The evidence thus far, however, establishes that the denial has resulted, and will continue to result, in demands by purchasers for refund of their payments for lots in the two areas and has caused a reduction in value of the unsold lots in those areas. In addition, Deltona has established utilities, roads, schools, businesses, and recreation facilities on the basis of projected population which will never materialize due to the denial of the Barfield Bay and Big Key permits.

In brief, defendant has brought Deltona's plans for development of the Barfield Bay and Big Key areas to a dead halt and, while not directly relevant to this case, is continuing to thwart Deltona's plans for development

of other areas within its master plan for which one or more permit applications are pending at this time.

V. Permit Application Proceedings

It was not until 1968 when Deltona prepared to develop the second area, namely, the Roberts Bay area, that application was made to the U.S. Corps of Engineers for a Federal permit under Section 10 of the River and Harbor Act of 1899 to dredge and fill areas within the Roberts Bay area which at that time were considered to be subject to the Federal navigation servitude.[7]

In seeking approval of the Roberts Bay permit application, Deltona submitted to the Corps a complete disclosure of the entire master plan, development status reports, sales status reports, and other documents, concerning the entire five-section development.

Whereas the Corps, up to that time, had routinely granted dredge and fill permits of the type sought by Deltona,[8] increasing pressures were brought to bear against the Corps to give consideration to environmental factors, aside from the impact on navigation, in considering the dredge and fill permit applications. As a consequence of these additional concerns, certain conditions with respect to future sales and development in the master

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[7]Inasmuch as none of the property in the Marco River area required dredging or filling of navigable waters, Federal permits were not sought for development of that area.

[8]Finger-fill or canalized developments were commonplace not only along the coastal areas, but also in low-lying lands inland from the coast.

planned area were set forth in the dredge and fill permit application granted for the Roberts Bay area. Deltona was advised that it could not expect to receive routine approval of future applications for permits to dredge and fill, but that each application would be considered on its own merits. Nevertheless, Deltona was specifically permitted to continue the sale of property within the planned areas for which dredge and fill permit applications had not yet been filed.

Deltona, as part of its ongoing effort to implement its long-range development plan thereafter filed three applications for dredge and fill permits under Section 10 of the River and Harbor Act of 1899 (33 U.S.C. §403) and Section 404 of the FWPCA (33 U.S.C. §1344), with respect to the Collier Bay, Barfield Bay, and Big Key areas. The three applications (73G-0496, 0497, 0498) were originally filed on March 2, 1973, and were revised on March 22, 1973.

The Corps advised Deltona by letter dated July 6, 1973, that the three applications would not be processed without filing an environmental impact statement as required by the National Environmental Policy Act of 1969, P.L. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §4321-47), and a state water quality certification as required by the Act of April 3, 1970, P.L. 91-224, 84 Stat. 91. Neither of these requirements existed when Deltona applied for and obtained its previous Federal dredge and fill permits. Deltona complied with the Corps' requirements and submitted further revised applications on April 15, 1974, including the state water quality certification which had been granted on April 10, 1974.

At about this time there was an ongoing dispute between the Corps and EPA over their respective jurisdictions of areas above mean high water and over jurisdiction of other dredging or filling permits which did not affect navigation but which affected the environment above as well as below MHW. The Corps took the position that its jurisdiction over applications under Section 10 of the River and Harbor Act of 1899 (and Section 13 of the Refuse Act of 1899) was limited to the traditional tests of navigability and to areas below mean high water and that Section 404 of the FWPCA did not enlarge that jurisdiction. The matter was resolved to the contrary by an unappealed judgment of the United States District Court for the District of Columbia on March 27, 1975, in *Natural Resources Defense Council, Inc., et al. v. Callaway, et al.*, 392 F.Supp. 685 (D.D.C. 1975), (a declaratory judgment action) wherein District Judge Aubrey E. Robinson, Jr., declared that:

> 1. Congress by defining the term "navigable waters" in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. §1251, *et seq.* (the "Water Act") to mean "the waters of the United States, including the territorial seas," asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in The Water Act, the term is not limited to the traditional tests of navigability.

The court ordered the Secretary of the Army (Secretary Callaway) and the Chief of the Army Corps of Engineers (General Gribble) to revoke and rescind

the definition set forth in the regulations published in 39 Fed. Reg. 12115, *et seq.*, on April 3, 1974. The court further ordered publication of proposed regulations within 15 days and final regulations within 30 days of March 27, 1975 "clearly recognizing the full regulatory mandate of the Water Act." Pursuant to the order of the court (no appeal having been taken), the Corps published for comment four alternative proposed regulations in 40 Fed. Reg 19766, *et seq.*, on May 6, 1975. Interim final regulations were published in 40 Fed. Reg. 31320 on July 25, 1975 as Sections 209.120, *et seq.* of 33 C.F.R., and comments thereon were invited during the succeeding 90 days.

The Corps, "[b]ecause of the intense public interest in those applications," had already called a public meeting in Naples, Florida, on February 25, 1975, "to explain the reasons for the delays in processing the applications and the future steps to be taken in bringing them to a conclusion." Approximately 1,200 people attended the meeting. Following the presentation by the District Engineer, 32 people spoke in favor of issuing the permits and 8 in opposition. In addition, 10 trade unions were represented and spoke in favor of issuing the permits.

In the meantime, a draft EIS was prepared in connection with the Deltona applications and, upon completion, another public notice was issued on April 25, 1975.[9] Comments were received from Federal and

[9]This date, it will be noted, was one month after Judge Robinson's declaration in *Natural Resources Defense Council, Inc., et al. v. Callaway, et al.*, 392 F. Supp. 685 (D.D.C. 1975), and just 10 days before publication of the proposed broadened regulations by the Corps.

state agencies, as well as letters and petitions or resolutions from interested persons and organizations. There were 541 letters received in favor of granting the permits and 2,750 letters in opposition. On the other hand, there were six petitions or resolutions carrying 11,900 signatures favoring issuance, but only 1,217 signatures on 31 petitions or resolutions opposing issuance. Most of the letters written in opposition resulted from the activity of the Audubon Society.

There were 42 written requests for a public hearing on the applications in accordance with the provisions of the FWPCA 1972 amendments. The Corps completed and made available to the public a proposed final EIS on August 15, 1975, and held another public hearing in Naples on September 2 and 3, 1975. Approximately 1,300 people attended that hearing. Of the 87 people who spoke, 44 were in favor of issuing the permits and 43 were opposed.[10]

Having complied with all requirements of the statutes and regulations, the District Engineer (Col. Wisdom) submitted a report to the Division Engineer, South Atlantic Division (Col. Hall, Acting Division Engineer) on October 16, 1975, recommending that the District Engineer be authorized to issue the Collier Bay permit and to deny the Barfield Bay and Big Key permits.

By 1st Indorsement dated November 12, 1975, the Acting Division Engineer forwarded the report of the District Engineer to the Office of the Chief of Engineers

[10]The numbers are not significant if, for example, each side was given an opportunity to speak in turn.

in Washington, D.C., with his recommendation that all three permits be issued.[11]

Apparently, the recommendation of the Acting Division Engineer never reached the Chief of Engineers (or the Secretary of the Army). It was addressed to "HQDA (DAEN-CWZ-A) WASH DC 20314." By 2nd Indorsement dated December 12, 1975, the file was returned to the Division Engineer, South Atlantic Division, by someone (the signature being illegible) who signed "for KENNETH E. MCINTYRE, Brigadier General, USA, Deputy Director of Civil Works." Directions were given to the Division Engineer, South Atlantic Division, to make extensive additions and revisions to the District Engineer's report in an obvious effort to make the strongest possible case to support denial of all three applications, yet allowing for the possibility of issuance of the Collier Bay permit and denial of the Barfield Bay and Big Key permits as an alternative.

The instructions given in the name of the Deputy Director of Civil Works were handed down to the District Engineer by Col. Hall (who by that time had become Deputy Division Engineer) by 3rd Indorsement dated December 24, 1975. In all material respects the Deputy Division Engineer concurred in the instructions handed down from the Deputy Director of Civil Works. The final paragraph of the indorsement made it clear, however, that *after* the District Engineer revised his report, the "decision document and EIS" would be submitted to the Office of the Chief of Engineers (OCE) for approval. A tentative date of January 21, 1976 was set for a

[11]A discussion of the reasons for the recommendation is set forth in the 1st Indorsement.

meeting with "OCE" to discuss the decision document and EIS "in final draft form."

The District Engineer (Col. Wisdom), by 4th Indorsement dated January 15, 1976, submitted the revised documents to the Division Engineer. In that indorsement Col. Wisdom made reference to meetings held on January 7, 1976, with South Atlantic Division (SAD) personnel in Jacksonville, and on January 13, 1976, with SAD and OCE personnel, stating that the 4th Indorsement was in response to those discussions, as well as the 2nd and 3rd Indorsements. He acknowledged that the type of community planned by Deltona "requires direct water access to fulfill its basic purpose." He went on to say that "The importance to the public of 'waterfront' as opposed to 'inland' homesites in Florida can be demonstrated by a comparison of land prices which are in the range of $13,500 to $21,500 for waterfront lots on Marco Island, as compared to about $5,500 for an otherwise comparable lot situated in an inland subdivision of Collier County." Nevertheless, Col. Wisdom adhered to his original position regarding approval of only one of the three applications, stating that "development of Barfield Bay and Big Key as proposed *will* cause 'a permanent unacceptable disruption to the beneficial water quality uses of the affected aquatic ecosystem.' Completion of Collier Bay on the other hand will cause a permanent disruption but not of an 'unacceptable' magnitude."

The District Engineer concluded his recommendation by saying that, after considering all additional data, including "two recent Deltona letters," he would not change his recommendation that the Collier Bay permit be issued and the Barfield Bay and Big Key permits be denied.

The Division Engineer (Maj. Gen. LeTellier), on the same augmented record and applying the same Section 404(b) guidelines, laid out four alternatives in a 5th Indorsement dated January 19, 1976 to the Chief of Engineers (HQDA (DAEN-CWZ-A), WASH DC 20314). The first alternative would be to deny all three applications, whereby alteration or destruction of 2,200 acres of mangroves (0.5 percent of south Florida's total) would be avoided. This would, however, raise the question of restoration of mangroves in the upland areas of the Collier Bay area where work had already been completed.

The second alternative would be to approve the work already completed (since it was above mean high water and therefore did not require a permit at the time it was done), in which case there would be no further "destruction of wetlands or terrestrial habitat."

The third alternative would be to issue a permit for Collier Bay only. This would allow completion of the third of the five planned areas of the Marco Island community with removal from the estuary of only 113 acres of mangroves, 1,131 acres of terrestrial habitat, and 246 acres of bay bottom.

The fourth alternative was to issue all three permits. This would allow completion of all five Marco Island community areas as contemplated in the master plan and would remove from the estuary 2,200 acres of mangroves (0.5 percent of south Florida's total), 3,400 acres of terrestrial habitat, and 735 acres of bay bottom.

Gen. LeTellier took the position that refusal by the Corps to issue the Collier Bay permit could be construed as "such a substantial and unwarranted taking

of property rights as to be a condemnation of this property because of the extenuating circumstances described above." He further elaborated on that position by stating that denial of the Collier Bay permit "could" be held to constitute a substantial taking of property rights (inverse condemnation) without the requisite benefit to the environment, which is the justification for the statute that authorized the regulation of property rights for the public health, safety, and welfare."

The indorsement acknowledged that *at all times* the Federal Government, through the Corps, was aware of all the work Deltona was doing and planned to do in accordance with the master plan and work schedules submitted to the Corps. Gen. LeTellier repeated in paragraph 11 of the indorsement that denial of the three permits "would impose a great hardship on the applicant and constitute a substantial taking of property rights. This could constitute a case of inverse condemnation if the permits for these areas are denied."

Gen. LeTellier recognized that it was Corps policy to issue permits after receiving favorable state determination "unless there are overriding National factors of the public interest." He characterized the key public interest item to be the wetlands, not navigation. Even the water quality certification established that pollution was not a factor. Weighing the ecological, social, and economic factors, he concluded that granting the permits would provide social and economic stimuli to the local area, but would impact adversely on the existing local marine ecology. Conversely, denial of the permits would not only eliminate the adverse ecological impact but also would eliminate the economic (and social) stimuli. He made a finding that there was "no

overriding National interest reason not to issue the permits."

The Division Engineer (whose jurisdiction is more regional than local in scope) rejected the District Engineer's "domino theory" that granting of the three permits would establish a precedent whereby all future applications would be granted. He took the position that each application must be considered on its own merits. He felt that it could be "a dangerous and indefensible act to turn down or approve a permit on the basis of its effect on other propositions not currently at issue."

Finally, Gen. LeTellier recommended to the Chief of Engineers that *all three* permits be issued.

The Chief of Engineers (Lt. Gen. W.C. Gribble, Jr.), by 6th Indorsement dated April 15, 1976, however, agreed with the recommendation of the District Engineer, rejected the recommendation of the Division Engineer, and authorized the District Engineer only to issue the Collier Bay permit and deny the Barfield Bay and Big Key applications. In certification of a "Statement of Findings," Gen. Gribble (under date of April 15, 1976) did not agree that "a strict interpretation of our wetland policy and the 404(b) guidelines dictate a denial of all three [applications]" but made a finding that there are "overriding national factors of the public interest which dictate denial of Barfield Bay and Big Key" notwithstanding the unequivocal approval of all three areas by the State of Florida from its Governor on down to the lowest local level.

Gen. Gribble made it clear in the 6th Indorsement that the "overriding national factors of the public interest" which he considered were based *solely* on the Corps' *wetlands* policy. He recognized that application of that policy would be in direct conflict with the desire of the property owners to develop the areas for housing. In this respect the Corps denied the permits on the basis of the *use* to which the property was to be put rather than the removal or disturbance of the mangroves and aquatic life in the areas. Gen. Gribble recognized, but gave no heed to the warning signal given by his subordinate, Gen. LeTellier, that denial of less than all three permits might constitute a taking. Gen. Gribble chose to deny the Barfield Bay and Big Key applications in the face of the warning and thereby took the responsibility for the consequences, whatever they might be.

The 6th Indorsement authored by Gen. Gribble under his authority as Chief of Engineers (speaking also by authority of the Secretary of the Army) makes it clear that changes in the Corps' policies and decision-making were compelled by intensification of "the environmental concerns of the Congress, the Corps and other Federal agencies and a significant segment of the public" within the 10 years preceding 1976. It is also clear from the record that Judge Robinson's order caused a significant change in the Corps' policies and actions. In other words, the changes came about after Deltona had made an investment-backed commitment beginning in 1964-65 to develop all five areas of the Marco Island community. Deltona was stopped only after most of the lots in the area were sold to members of the public in reliance on commitments of the State of

Florida and the Federal Government, and after the entire community was about half completed.

The issue before the Secretary of the Army, speaking through his Chief of Engineers, clearly was to determine the extent to which he could, by regulation and administrative action, control the use of Deltona's property without compensating Deltona in an effort to carry out the mandate of Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" within the full extent of the powers of Congress under the commerce clause of the Constitution of the United States. He opted for issuance of the Collier Bay permit and denial of the application for the Barfield Bay and Big Key permits. The decision was not made on the basis of "overriding national factors," but solely on the basis of the "current policies on conservation of our coastal wetlands."

The net effect of the denial of the Barfield Bay and Big Key applications for permits was the same as if Congress had set aside the areas as national parks or preservation areas without providing for due process and compensation of the property owners for the property affected by the congressional action.

VI. The Mangrove Ecology

Inasmuch as the mangrove ecology in the vicinity of the Deltona property is substantially the same as that in the vicinity of the Jentgen property, the discussion thereof in the *Jentgen* case, reported on even date herewith, is incorporated herein by reference and will

not be repeated. Both properties are in what is commonly referred to as the Florida Everglades and both properties are in proximity to the Everglades National Park and the National Big Cypress Preserve. Furthermore, much of the testimony and documentary evidence received in the *Jentgen* case was repeated or duplicated in the present case. A substantial amount of the evidence on the mangrove ecology was also included in the administrative record of the Deltona permit application proceedings and is included in the record of the present case. Accordingly, findings in the present case are based on the record made herein even though they may not be discussed specifically in this section of the opinion.

VII. Contentions of the Parties

A. Deltona's Position

Deltona asserts that by denial of dredge and fill permits under §404(b) of the FWPCA (33 U.S.C. §1344), by the Corps of Engineers, the Federal Government has deprived Deltona of its lawful right to make the highest and best use of its property.

Deltona seeks just compensation for what it considers to be a taking of its property by inverse condemnation[12] by the United States Government. More specifically, Deltona asserts that it has the right under Florida law and its Settlement Agreement with the State of Florida to dredge and fill in all areas approved by the State of

[12]The Supreme Court of the United States has recently defined the term "inverse condemnation" as "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *United States v. Clarke*, 445 U.S. 253 (1980).

Florida through its state and local agencies, both above and below mean high water, except where such dredging or filling would interfere with marine navigation and thereby be subject to the conventional Federal navigation servitude.

Deltona likens its right to dredge and fill its property to the right of the owner of mineral rights to mine coal, whereby the owner may make the highest and best use of his property, as exemplified in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). It contends further that, the right to dredge and fill having been taken away by denial of its application under Section 404(b) of the FWPCA, it is entitled to just compensation under the fifth amendment to the Constitution for the loss caused by the taking, under the rationale of *Benenson v. United States*, 212 Ct. Cl. 375, 548 F.2d 939 (1977) and *Drakes Bay Land Co. v. United States*, 191 Ct. Cl. 389, 424 F.2d 574 (1970).

Deltona points out that it made reasonable investment-backed commitments to develop its land as early as 1964 (prior to enactment of the FWPCA Amendments of 1972 and more than 10 years prior to promulgation of expanded guidelines and regulations thereunder by the Corps and EPA in 1975), and that it has been denied the right to carry out those commitments, to its economic detriment. In support of this contention, Deltona relies upon the recent decision of the Supreme Court of the United States in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

Deltona submits that since the only viable economic use of the property is as part of its integrated, master-planned, "finger-fill" or "canalized" community, it is

forced to leave the mangrove growth thereon in its undisturbed, natural state for the public benefit without just compensation.

In the case pending before this court, Deltona seeks only a monetary judgment for the taking of an ecological or preservation easement by the Federal Government. In the case pending before the United States District Court for the Middle District of Florida, Deltona is seeking judicial review of the administrative proceeding under which the dredge and fill permits were denied. Deltona is committed, however, to forego its claim for relief in the latter case upon receiving a final favorable judgment in the case before this court. Conversely, dismissal of the case in this court would not preclude further proceedings in the district court case. The result of a judgment favorable to Deltona in the Court of Claims action would be *preservation* of the mangroves (which is the prime concern of defendant and *amici*), whereas a favorable judgment in the district court case would result in completion of the development (with consequent *removal* of much of the mangrove growth). Denial of relief in both courts would leave Deltona in the "Catch 22" position of holding the property for the public benefit but without any compensation or other relief whatever.

B. Defendant's Position

Defendant submits that plaintiff has no "property right" in terms of a right to dredge and fill in areas over which the Federal Government has asserted statutory and regulatory, as well as common law jurisdiction. Since Deltona has no "property right," reasons defendant, nothing has been taken for which

just compensation must be paid under the fifth amendment to the Constitution.

Alternatively, defendant contends that (even if Deltona has a "property right") there has been no "taking," since Deltona has not been deprived of *all* beneficial uses of its property.

Defendant takes the position that it is unnecessary for it to rely on the doctrine of navigation servitude since the United States may protect its own interests in "public waters" by prohibiting acts which are "detrimental" to those waters even where navigation, *per se*, is not affected. In support of this position defendant points out that, in enacting the FWPCA Amendments of 1972, Congress expanded the conventional definition of "navigable waters" to mean "waters of the United States," the purpose being to give the definition "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." Defendant also calls attention to the congressional objective of the FWPCA Amendments of 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by prohibiting *pollution* of those waters as well as prohibiting interference with navigation.

It is defendant's position that Congress derives its authority to regulate the "waters of the United States" from the commerce clause of the Constitution and not under the police power inherent in the general welfare clause of the Constitution. In this respect defendant relies upon the following distinction drawn by Freund in his 1904 work entitled *The Police Power:*

> It may be said that the State takes property by eminent domain because it is useful to the public, and under the police power because it is harmful * * *. From this results the difference between the power, that the former recognizes the right to compensation, while the latter does not.

Consequently, defendant argues that denial of dredge and fill permits is not a "taking" of a property right (even though the area to be dredged or filled is above mean high water), since the applicable legislation and regulation is designed to secure a public benefit for which compensation of the affected property owner is not required.

Defendant asserts that the decision of the Supreme Court of the United States in *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978) supports its position that denial of a permit to alter property in a way which adversely affects the (aesthetic) environment is not compensable unless *all* value of the property has been lost. In this respect, it necessarily follows that defendant's position is that the taking of any property right less than the entire fee is not compensable. Defendant suggests that *Benenson, supra*, also supports that contention inasmuch as the Court held in that case that: "Unlike the facts in the cases cited by the defendant, plaintiffs have no beneficial or reasonable use of the property left to them."[13]

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[13]Defendant failed to call attention to the following sentence which appears after the sentence quoted above: "They are, in fact, forced by the PADC denial to maintain the Willard for the benefit of the populace at a cost of hundreds of thousands of dollars a year with a complete loss of profits and with no certain and foreseeable relief."

It is defendant's belief that Deltona can make use of the portions of the property above mean high water where there is no mangrove growth and no dredging or filling of wetlands is required, thereby salvaging some value for the property, as a whole. As a further proposal, defendant suggests that other properties in the area which are owned by Deltona might be developed in lieu of the wetlands which were to be dredged and filled and thus Deltona has not been deprived of all use of all of its properties.

C. Amici's Position

The Environmental Defense Fund, Inc., the National Audubon Society, Inc., the Florida Audubon Society, Inc., and the Collier County Conservancy, as *amici curiae*, have filed a brief which, for the most part, parallels the brief filed by defendant. The *amici* submit that Deltona has no property right of which it has been deprived by denial of their applications for permits and that, even if Deltona has a property right, the denial did not deprive Deltona of all uses of its property.

The *amici* contend that the legislation and regulations under which Deltona was denied the permits rest upon the welfare clause of the Constitution inasmuch as the action of the Corps was "in furtherance of public health, welfare and safety." More particularly, they contend that the mangroves "have significant values for water quality, fisheries, wildlife, coastal recreation and storm protection," and it is those *values* which are protected by the action of the Corps.

It is the further contention of *amici* that the completed approval of the Deltona development by the State of Florida and all its agencies, and the issuance of the Roberts Bay permit under conditions "bb" and "cc," did not give Deltona grounds for a reasonable expectation that their investment-backed project would be completed according to the master plan upon which such approvals were based.

Both *amici* and defendant would have the court regard any prospective representations by Government officials as *ultra vires* or even illegal. It is their contention that a specific application must be filed for each area to which the master plan applies even though it was not practical for Deltona to file applications for all five areas at once in 1964-65. (By hindsight, it might have behooved Deltona to have done so in light of the earlier approval of the Marco River and Roberts Bay permits.)

Amici also submit that Federal jurisdiction extends to activities in areas above mean high water "where such activities will alter significantly the ecological condition of the navigable waters and will therewith cause a public nuisance."

Finally, *amici* have attempted to inject consideration of the Flood Disaster Prevention Act of 1973, 42 U.S.C. §4001 into the case. In support thereof they seek consideration of very recently issued maps to support a contention that the Deltona property could not now be used as residential property under current Federal and county regulations. Since the taking, if any, occurred in 1976, any regulations promulgated after that date are irrelevant and inadmissible in evidence. Moreover,

amici may not submit evidentiary matter in this case, their motion for leave to intervene having been denied.

VIII. Discussion

Defendant and *amici*[14] challenge Deltona's right to even maintain the present action on the ground that Deltona has no common law or inchoate *right* to dredge or fill either in navigable waters or wetlands (as defined by Federal statute and regulations). It is argued further that Deltona does not have a right to receive a permit to dredge and fill since the sovereign has the sole power to regulate private use of (and in effect, owns) not only the navigable waters but also "wetlands" (*i.e.*, adjacent areas which support vegetation which requires saturated soil for growth).

It is clear from the established precedents that there can be no private ownership of the navigable waters. Neither are they *owned* by the sovereign. They are in the public domain and the public has an *easement* in perpetuity to use those waters. The sovereign, however, is responsible for control of the navigable waters to the extent necessary to keep them safe and unobstructed for public use. The common law power to control navigation in the respective states was originally held by the states and the people, but was surrendered by them to the Federal sovereign under the commerce clause of the Constitution of the United States. Inasmuch as the power to regulate the navigable waters is in derogation of the common law rights of the states and

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[14]Brief *amicus curiae* filed by Environmental Defense Fund, Inc., National Audubon Society, Inc., Florida Audubon Society, Inc., and The Collier County Conservancy.

the people, such right is to be narrowly construed to extend geographically only to mean high water.

A. Constitutional Basis for Statutes in Issue

Section 10 of the River and Harbor Act of 1899, 30 Stat. 1151 (codified in 33 U.S.C. §403), finds its constitutional basis in the commerce clause of the Constitution of the United States (Article I, Section 8, Clause 3). This section (and Section 9 of the same act) superseded the Act of September 19, 1890, c. 907, §7, 27 Stat. 8, 110), and has remained unchanged in substance up to the present. At the time of the enactment of the River and Harbor Act of 1899 it was well established that Congress had the power to control " * * * all the navigable waters of the United States which are accessible from a State other than those in which they lie." *Gilman v. Philadelphia*, 3 Wall. 713, 724-725. This necessarily included the power to " * * * keep them open and free from any obstruction to their navigation * * *; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders." *Ibid. 725.* This power is also extended to all riparian owners since their properties are subject to the power which existed in the states before the adoption of the Constitution (and always existed in the Parliament in England) to subject such properties to a common law navigation servitude.

By judicial interpretation in *The "Daniel Ball" v. United States*, 10 Wall. 557 (1871), the Supreme Court interpreted the power to control *navigation* to include navigation upon wholly intrastate waters by a vessel carrying *cargo* which was en route to or from a point outside the state in which the waters were located.

Thus the scope of authority of Congress to control navigation was expanded beyond the mere control of the waters and the vessels plying those waters to include activities which took place upon those waters where such activities involved interstate transportation of goods.

The only respect in which the Deltona property affects or is affected by interstate commerce is in the sale of lots or residences to out-of-state purchasers. Obviously, the sale of property under these circumstances would be subject to the Interstate Land Sales Disclosure Act, P.L. 90-448, Title XIV, §1402, *et seq.*, Aug. 1, 1968, 82 Stat. 590; 15 U.S.C. §§1701, *et seq.*, and therefore is commerce within the meaning of Article I, Section 8, Clause 3 of the Constitution. That statute, however, is not the basis for denial of the dredge and fill permits in this case.

The common law term "navigable waters," accordingly, is not synonymous with the term "navigable waters of the United States" as used by the courts in interpreting the Federal statutes. The latter term gained currency in 1975 as a result of the expanded definition thereof appearing in the regulations promulgated by the Department of the Army (33 CFR 209.120) for the purpose of implementing Section 404 of the Federal Water Pollution Control Act of 1972 (33 U.S.C. §1344). In the regulations "navigable waters of the United States" is "administratively" defined to mean "waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate commerce landward to their *ordinary* high water mark and up to the head of navigation as determined by the Chief of Engineers, *and also waters that are subject to*

the ebb and flow of tide shoreward to their mean high water mark **(mean higher high water mark on the Pacific Coast)." (Emphasis supplied.)**

The original term "navigable waters" has been administratively defined for the purposes of Section 404 of the FWPCA as including not only those waters embraced within the definition of "navigable waters of the United States," but also "all coastal wetlands, mudflats, swamps, and similar areas that are *contiguous* or adjacent to other navigable waters." "Coastal wetlands" are further defined by regulation to include "marshes and shallows" and "those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction."

The definition is not limited to the foregoing but also includes "freshwater wetlands, including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to other navigable waters and that support fresh water vegetation." The definition goes on to state that "freshwater wetlands" means "those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction."

It is obvious that the administratively promulgated definition of "navigable waters" goes far beyond the conventional understanding of that term (as of the date of promulgation), since the definition does not relate to *navigability* of the waters but is expressed solely in terms of the ability of the land, whether inundated or moistened by saline or fresh water, to support *vegetation.*

The conventional limits of the navigation servitude comprehended both by Section 10 of the River and Harbor Act pf 1899 and Section 13 of the Refuse Act of 1899 are exceeded by the foregoing definition of "navigable waters" and "navigable waters of the United States" since the navigation servitude contemplated in 1899 was conventionally understood (prior to promulgation of the 1975 administrative definition) to extend only to the mean high water level of navigable waters (whether interstate or intrastate, if used for commerce) up to the headwaters thereof.

This is not to say that either the Congress or the Department of the Army has exceeded its constitutional *power* in regulating the use of land which will support vegetation which requires saturated conditions, if (and only if) there is a nexus between such use and interstate commerce. In such event, however, compensation is required, even though normal due process (*i.e.*, a formal declaration of taking) has not been employed *before* implementing the regulation.

B. Legislative Intent

Pursuant to its constitutionally delegated authority to regulate the navigable waters, Congress enacted Section 10 of the River and Harbor Act of March 3, 1899, c. 425, §10, 30 Stat. 1151 (codified in 33 U.S.C. §403)[15] to prohibit the creation of any obstruction to the

[15]"§403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in. The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures

navigable capacity of any of the "waters of the United States" except as authorized by Congress on plans recommended by the Chief of Engineers and approved by the Secretary of the Army.

At the same time Congress enacted Section 13 of the Refuse Act of March 3, 1899, ch. 425, §13, 30 Stat. 1152 (codified in 33 U.S.C. §407).[16] This act made it unlawful to discharge "any refuse matter" into any

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(Footnote 15 Continued)

in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

[16]"§407. Deposit of refuse in navigable waters generally. It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable

"navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; * * * whereby navigation shall or may be impeded or obstructed * * *." The Act provided, however, that when, in the judgment of the Chief of Engineers "anchorage and navigation will not be injured thereby," the Secretary of the Army could permit the deposit of such matter within limits prescribed by him. This act was the foundation for the FWPCA Amendments of 1972.[17] Prior to 1970, the principal involvement of the EPA with the Corps of Engineers was with respect to dredge and fill permits under Section 10 of the River and Harbor Act of 1899 (33 U.S.C. §403). However, on

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(Footnote 16 Continued)

water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

[17]*Hearings Before the Subcommittee on Air and Water Pollution of the U.S. Senate Committee on Public Works*, 92nd Cong. 1st Sess., Feb. 4, 8 and 9, 1971 (Serial 92-H1), pp. 2 (1st par.); 10 (ante-penultimate par.); 22-25 (colloquy between Senator Eagleton and EPA Administration Ruckelshaus); pp. 25-26 (colloquy between Senator Randolph and EPA Administrator Ruckelshaus).

December 23, 1970, under Executive Order 11574, President Nixon invoked Section 13 of The Refuse Act of 1899 (33 U.S.C. §407) to initiate a permit program under which the Corps of Engineers and EPA were to cooperate with respect to the effect of refuse disposal on *water quality* of the navigable waters of the United States. 35 Fed. Reg. 19627 (1970).[18] Throughout the hearings it was recognized that the principal responsibility for control of water quality rested with the states and that the only way the Federal Government could inject itself into the matter was through the power of Congress to regulate commerce.

Whereas Section 10 of the River and Harbor Act of 1899 prohibited direct obstruction of navigation, Section 13 of The Refuse Act of 1899 was intended to prevent the discharge or dumping of refuse into the navigable waters of the United States "whereby navigation shall or may be impeded or obstructed." In both sections permits could be issued by the Corps of Engineers to allow exceptions to the prohibited acts where the issuance of such permits would not adversely affect *navigation.* Nowhere in either section is reference made to the maintenance of any standard of water quality necessary to *support* aquatic life. It might be argued that Section 13, in particular, contemplates control of discharge of *toxic* or *noxious* effluents into Federal waters but nowhere is there found any basis for requiring a property owner to *maintain* or *refrain from removing* a beneficial source of effluent, such as the detritus from mangrove trees.

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[18] *See also,* a memorandum submitted to the Senate subcommittee by David D. Dominick, Acting Commissioner, EPA Water Quality Office appearing at pp. 35-36 of the *Hearings, supra.*

The legislative history of the FWPCA Amendments sheds much light on the efforts of the EPA and Congress to bootstrap the power of Congress to regulate the local environment. During the 1971 hearings, Senator Eagleton put the question to EPA Administrator Ruckelshaus this way:

> SENATOR EAGLETON. Now, my final area of inquiry on this subject matter concerns the interrelationship between this 1899 Refuse Act, the one we passed in 1970, and also the Fish and Wildlife Coordination Act passed in the 1950's and the National Environmental Policy Act which was passed in 1969.
>
> When the crops [sic] after consulting with you decides whether to issue the permit, does it consider only—and do you then consider only—questions of navigation and water quality, or are there other criteria that you likewise consider such as the public interest, fish and wildlife, et cetera, et cetera?

Administrator Ruckelshaus and Senator Eagleton continued the colloquy as follows:

> MR. RUCKELSHAUS. Senator, that is a question not without some complexity.
>
> Let me try and make our position as clear as possible.
>
> We think that the authority on which the Environmental Protection Agency has a right to review water quality standards as relating

to these permits is much stronger given the Refuse Act and the Water Quality Act, section 21. We believe that by taking into account the whole question of water quality and related considerations we thereby take into account public interest as it relates to this question.

Now, the Fish and Wildlife Act of title XVI, section 662, gives them the power to consider fish and wildlife consideration. Again, under our reading of that—

SENATOR EAGLETON. Gives who?

MR. RUCKELSHAUS: The Fish and Wildlife Bureau of the Interior Department.

SENATOR EAGLETON: Is that under EPA?

MR. RUCKELSHAUS: No; that is still under the Interior Department. Only as it relates to dredge and fill operations or navigational concerns.

What we have attempted to do in our memorandum of understanding with the Corps of Engineers is to spell out the kinds of considerations that the Environmental Protection Agency will take into account in recommending to the Corps of Engineers that they issue or not issue a permit, and in our memorandum of understanding and No. 1, under policies, this statement is contained:

"The Corps shall accept such advice" that is, our advice relating to whether

they should issue the permit—"on matters pertaining to water quality standards and related water quality considerations as conclusive and no permit shall be issued which is inconsistent with any findings, determination, or interpretation of a regional representative with respect to such standards or consideration."

Now, we believe that under this provision if in any outfall or any effluents there are in addition to water quality standards considerations which relate to fish and wildlife, that the Environmental Protection Agency can take those considerations into account at the same time we are consulting with the Interior Department and the Fish and Wildlife Bureau of that Department in recommending to the Corps of Engineers as to whether they should grant a permit.

We are committed to consult with the Fish and Wildlife Bureau of the Interior Deprtment in any instance where it appears that the discharge will have some effect on fish and wildlife and take into account their recommendations to us in finally recommending to the corps whether a permit should be issued.

SENATOR EAGLETON: I am glad to hear that because it has been alleged that the permit program that you are enbarking upon with these 40,000 sources might be so narrowly gaged as to restrict itself simply to navigation and to a narrow definition of water quality

and not take into account other broader questions of "public interest."

I take from the thrust of your statement and your reference to your memorandum of understanding that related water quality considerations will broaden the scope of your approval process to go beyond just navigation and water quality.

MR. RUCKELSHAUS: This is right, Senator.

We believe this permit program is related to the maintenance of water quality in the broad sense and that the public interest involved with the permit program is to preserve water quality, again in the broad sense. So, we think that by adopting this mechanism we are on much stronger and firmer legal grounds in interpreting our power under the statute than we would be if we adopted a much broader definition of "public interest."

SENATOR EAGLETON: Now, thus far my questions insofar as the Refuse Act is concerned, I guess, have been gaged in and zeroed in on section 13 of the act.

What about section 10 of the act, the 1899 act, which deals with other discharges or other matters that might be in the nature of obstructions which could include, for instance, pipe protruding out into the river?

Do you plan to issue, or have you issued, regulations pursuant to that section and what is the scope of those insofar as criteria are concerned? Is it just water quality or is it a broader criteria, as well?

MR. RUCKELSHAUS: Mr. Quarles can answer that question.

MR. QUARLES: Senator, it is confusing because in a number of situations that come rapidly to mind, a permit would be required under the provisions of section 10 and it would also be true if you read the provisions in section 13 that a permit would be required under that section.

Section 10 really is a more familiar section and better flushed out as to its details and its manner of application because that has been applied for a considerable number of years and there are very well established procedures that are applied by the Corps of Engineers in granting permits under that section for the so-called dredge-and-fill projects.

Their procedures do encompass a review of the proposed findings by the Interior Department under a memorandum of understanding signed by Secretary Resor and then Secretary Udall in 1967.

One of the agencies which customarily reviewed those proposals under that

understanding was the Federal Water Quality Administration.

So, although the formal arrangements have not been confirmed in a written agreement yet, it is anticipated and, indeed, it is in effect that these projects are reviewed by EPA personnel for water quality considertions. They are also reviewed by the Interior Department personnel for a variety of considerations including fish and wildlife and recreation and other considerations.

They also presumably now are or will be reviewed by the personnel in the NATO Oceanographic and Atmospheric Administration.

SENATOR EAGLETON: So, regulations will be forthcoming for the implementation of section 10, and I take it that the criteria for the issuance of a permit under section 10 will include more than just water quality and navigation; since it is going to Interior, it will include considerations for fish and wildlife and so-called public interest.

MR. QUARLES: I doubt that regulations will be issued. I think there will probably be a memorandum of understanding that would cover our review of those findings.

I should mention also, Senator, that the regulations already issued as proposed regulations by the Army under this proposal specifically point out that in cases where both

permits are required, both permits must be applied for and obtained unless special arrangements are made for a single permit to cover both features, but it is great deal simpler and easier to keep these things understandable, to keep them separate in your mind and recognize that each have separate requirements which will have to be complied with.

SENATOR EAGLETON: Just one final question before yielding to Senator Buckley.

Could we be of service to you in trying to more precisely clarify in the forthcoming legislation the interrelationships between the various environmental pieces of legislation that have grown up as far back of 1899, et cetera, so that we could try to establish a very clear, specific mode of operation?

MR. RUCKELSHAUS: I think that would be helpful, Senator.

In the same series of hearings, EPA Administrator Ruckelshaus, in response to questions by Senator Baker concerning the applicability of the Refuse Act of 1899 to the permit program contemplated by EPA, took the position that the legislation under consideration (S. 1014) would expand the jurisdiction of the Federal Government with respect to water quality standards. He said:

MR. RUCKELSHAUS: * * * For example, expanding the applicability of water quality standards from interstate to intrastate waters

would be more in keeping with the purpose of the Refuse Act of 1899, which applied to all navigable streams and their tributaries. Some of the criticism that has been leveled at the permit program relates to the fact that the program does not apply to intrastate waters. This criticism would be made invalid if S. 1014 is enacted and agreement is reached on its basic thrust among everyone who has introduced a bill in the Congress.

SENATOR BAKER: Just this final question, Mr. Chairman, if you will bear with me for one moment further.

Do you propose the issuance of any regulations or statements of redefinition in connection with your position vis-a-vis the Refuse Act at this time?

MR. RUCKELSHAUS: There are four documents that provide useful background information on the permit program. One is the regulations of the Corps of Engineers pursuant to section 21(b) of the Federal Water Pollution Control Act that have been published for comment.

The second is regulations published by the Environmental Protection Agency pursuant to our authority under 21(b) of that act.

The third is the memorandum of understanding between the Environmental Protection Agency and the corps; and the fourth

is revised guidelines of the Justice Department for implementation of the Refuse Act of 1899.

After these had been published for comment, there was considerable question about their workability and about whether they would really effectuate the program as announced. We have met with innumerable groups who objected to the regulations, memorandum of understanding, and guidelines as they were initially published.

We have attempted to take all of these objections into account in coming up with a final memorandum of understanding and regulations that will be published shortly. I am sure we will not have satisfied everybody.

Senator Baker also queried Administrator Ruckelshaus regarding the extent to which EPA involvement in intrastate water quality control would lead to land use regulation by the Federal Government. It was Senator Baker's view that land use and environmental quality are interrelated and that " * * * we are teetering on the brink of Federal land-use policy."

Senator Mondale (now Vice President Mondale) expressed his concern for the environment of the Great Lakes and other fresh water bodies in the hearings on March 16, 1971, when he stated:

Unfortunately, we have allowed hundreds of our freshwater lakes to become dirty, polluted, and to be destroyed through what scientists

call eutrophication. We have dirtied our lakes in many careless and thoughtless ways. We have used them as convenient dumping places for municipal, industrial, and agricultural wastes, filling their depths with tons and tons of phosphate-laden sludge.

Often we have not even bothered to treat these wastes before pouring them into our lakes. These waters have enriched the waters, creating abnormal algae growth that have robbed the lakes of oxygen and turned them an unhealthy green color.

At the same time, in a wild quest for recreation property, developers have stripped many lakes of needed shoreline vegetation. This has allowed the erosion of soil and debris into the lakes, also helping to destroy their delicate balance of marine life. Our lakes are literally choking to death on these various pollutants, and many of them have already died.

We must provide families with vacation homes and recreation, but we must begin to treat our lakes as irreplacable resources.

* * * * *

Up until now, we have dealt primarily with interstate waterways, the rivers and larger lakes across State boundaries. These thousands and thousands of community lakes which are

so important to their communities and to the neighborhoods have been ignored, and I think just the nature of the cosponsorship of this measure indicates that action by the Federal Government is long overdue.

The position of the National Wildlife Federation (a national conservation organization) was made known to the subcommittee through a statement of Louis S. Clapper, Conservation Director of that organization and a member of the President's Federal Water Pollution Control Advisory Board. That organization, like EPA, focused its attention on the *harmful* effect of *discharge* of effluent on the aquatic environment and encouraged extension of Federal regulation beyond the traditional limits applied by the Corps of Engineers in its permitting program under the Refuse Act of 1899.

In a colloquy between Senator Baker and the late Senator Hart of Michigan, it was brought out that the Refuse Act of 1899 (not Section 10 of the River and Harbor Act of 1899), by its literal terms, provided a basis for the Corps of Engineers to regulate the discharge of effluent into waters within its jurisdiction. Senator Baker said, however, that "we tend from time to time, then, to press that piece of legislation beyond the obvious and literal language of the statute." Senator Hart agreed that "the drafters of the 1899 Act never anticipated the use to which we suggest it be applied, although the language clearly authorizes the use that we now argue should be made. They were thinking of ship bottoms not being torn out by rock that was dumped in and we are thinking of mercury that may not hurt the ship but can kill the child."

It is apparent from the foregoing excerpts from the legislative history of the FWPCA Amendments of 1972 that Congress did not intend that private citizens should be required to *maintain* or *sustain* a supply of *beneficial* effluent but that discharge of *harmful, toxic, noxious* or *obstructive* effluent should be *policed* and *prevented.*

Use of the permitting process as a means of preventing destruction or removal of mangrove trees, wherever located, is land-use regulation which is outside the purview of the statutes. Accordingly, application of regulations which go beyond the scope of the statute constitutes a taking where the result of such application is the denial of the right of a property owner to make the highest and best use of his property. Since the ecological considerations are the sole basis for denial of the permits in the present case, the cost of *preserving* the ecology must be borne by the public at large, not by the property owner alone.

C. Navigation Servitude

A totally different approach is taken when it comes to regulation or control of the aquatic resources which are not a part of the system of navigation or subject to the Federal navigation servitude in terms of effect on navigation, *per se.* Typical cases involve riparian rights of private parties as determined by the common law, state statutes, or local ordinances. Thus, where private parties divert the flow of water or where Federal activity (such as construction of dams) causes flooding of private property, there is a cause of action for the resulting damage.

If, on the other hand, through intent or neglect, a party creates a *nuisance* by polluting his neighbor's property or the waters to which the neighbor has a right, the nuisance may be abated either by private legal action or by appropriate legislation or governmental regulation. In such cases the civil wrong may be remedied by applying the normal tort criteria for the trespass on the neighbor's property or the police power may be invoked by governmental action. *Miller v. Schoene*, 276 U.S. 272 (1928).

Where, as here, the property owner is not *creating* a nuisance or *causing* pollution of the adjacent navigable waters, the normal riparian or tort law does not apply. Here it is the desire of the sovereign to prevent the owner from *removing* his *own* foliage from his *own* property. The sovereign contends that such removal would result in loss of a *beneficial* source of nutrition for fish and shrimp which are expected to be caught by private parties, *i.e.*, commercial or sports fishermen. In other words, there is an assertion of a dominant Federal servitude upon the private property on which mangroves are growing naturally.[19] Extension of the navigation servitude to prevent removal of beneficial vegetation growing on private property is, therefore, just as much a taking of the property as a prohibition against the removal of coal from under residential properties. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

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[19]This case is unlike that in which a property owner is required to cut down a cedar tree (without compensation) because the tree is the habitat of a type of pest which is causing damage to the apple trees on the property of another party. (*See* discussion of *Miller v. Schoene*, 276 U.S. 272 (1928) in 80 HARV. L. REV. 1198 (1967)).

It is significant to note that plaintiff has a lawful right to sever the mangrove trees at the trunk (just above mean high water, for example) and thereby completely frustrate the object of defendant's denial of a dredge and fill permit by removing the foliage. Defendant does not go so far as to contend that such action could be prevented unless plaintiff polluted the navigable waters or dredged or filled below MHW in the process of removing the upper portion of the trunks and the leafy growth of the mangroves. This hyperbolic illustration serves to prove that denial of the dredge and fill permit goes well beyond mere regulation of that which is subject to the dominant Federal servitude or even the police power. It constitutes a regulation of land use comparable in all respects to the taking of the Willard Hotel property in *Benenson v. United States*, 212 Ct. Cl. 375, 548 F.2d 939.

D. Property Rights Under State Law

The owner of property in the State of Florida has the constitutional right under the Florida Constitution (Article I, Section 9 and Article X, Section 6(a)) to "acquire, use, and dispose of it for lawful purposes." (*Kass v. Lewin*, 104 S.2nd 572, 578 (Fla. 1950). Moreover, the right of the property owner to make "economically beneficial use" of his property is protected under Florida Statutes 380.08(1). (*See also, U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945) for the proposition that the word "property" as used in the Constitution of the United States includes the right to *use* the property as well as the right to possess and dispose of it.)

It is also clear from the decisions of the Florida courts that property owners must be compensated for

their losses if they are denied the right to fill land which was former sovereignty land and where the purpose of the denial is based on ecological benefit to the public. (See *Askew v. Gables-By-The-Sea, Inc.*, 333 So.2d 56 (Fla. 1st DCA 1976); *Zabel v. Pinellas County Water and Navigation Control Authority*, 171 So.2d 376 (Fla. 1965); and *Alford v. Finch*, 155 So.2d 790 (Fla. 1963). *See also, Note, State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation*, 58 U. VA. L. REV. 876, 905-906 (1972)).

The matter of compensation for taking[20] by the State of Florida where development is thwarted by refusal of the state officials to issue a development permit is still being litigated in *Estuary Properties, Inc. v. Askew, et al.*, Case No. II-419, District Court of Appeal, First District, State of Florida. (The case is pending on appeal before the Supreme Court of the State of Florida, under the caption *Graham, et al. v. Estuary Properties, Inc.*, 58, 485, oral argument having been heard on June 6, 1980.)

If the Government takes less than the fee, the property owner's recovery is not limited to the fair market value of the owner's interest in the unimproved property affected by the taking, but must be based on the highest and best use to which the property may be put. *Benenson v. United States*, 212 Ct. Cl. 375, 548 F.2d 939 (1977). (*See also, United States v. Causby*, 328

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[20]Governmental action short of acquisition of title or occupancy, if its effect is so complete as to deprive the owner of all or most of his interest in the subject matter, amounts to a taking. *United States v. General Motors Corp.*, 323 U.S. 373, 378, citing Lewis, *Eminent Domain*, 3d Ed., §§63, 64.

U.S. 256 (1946) and subsequent "avigation" easement cases.)

When the United States of America deeded the swamplands of Florida to the State of Florida in consideration of the undertaking by the state or its successors in title to develop the lands, it surrendered title and all claim to Federal sovereignty over those lands except such rights as the Constitution of the United States has reserved to the Federal Government. Thus, from the time title passed out of the hands of the Federal Government, the owners of the title, in fee, had the *right* to dredge (excavate) and fill all such lands, subject only to such control as may be exercised by the State of Florida and the Federal *navigation* servitude (below mean high water).

Congress, by enacting the FWPCA, has sought to extend the common law navigation servitude, not only to private property below mean high water but also to property above mean high water, for purposes other than control of navigation. To the extent that Congress invokes the commerce clause as a basis for regulating use of property (either above or below mean high water) for purposes other than control of navigation, it is exercising the power of eminent domain and must compensate the private property owner for the resultant taking for public use.

Any restriction upon use of property *already* subject to "navigation servitude" is not compensable, whereas any restriction upon use of property *adjacent* property which is not subject to such servitude will require compensation if the restriction diminishes the value of

the property below the value of its highest and best use.

In determining the reach of the navigation servitude, *de facto* navigability of the waters is conclusive of the right of the sovereign to regulate those waters. Thus if it is necessary to regulate the use of property adjacent such navigable waters to protect the *navigability* of the waters, such regulation does not require compensation even if implementation of the regulation will result in either diminution of the value of the property below that of its highest and best use or complete destruction of the value of the property. If, however, the effect of the regulation is to *improve* the navigability of the waters, in any respect, any diminution of the value or a taking of the property *adjacent* the existing navigable waters exceeds the regulatory power of the sovereign and requires the exercise of its powers of eminent domain, with due process, to effect a *compensable* taking for the public benefit.

X. Summary

Under the facts of the present case, the denial of the permits sought by Deltona, *ipso facto*, constituted a *de facto* condemnation of the property since the result is the same as if the Federal Government had employed due process under its power of eminent domain and filed a declaration of taking to *preserve* the mangrove growth on Deltona's property.

Whereas there were unfulfilled threats of condemnation in *Drakes Bay* and *Benenson*, *supra*, to preserve the respective properties, it was the denial of

permits in each case which accomplished defendant's desired result without a formal declaration of taking. The Drakes Bay property became, *de facto*, a part of the Point Reyes National Seashore area (16 U.S.C. §459c-1 (1964), P.L. 87-657, Sept. 13, 1962, 76 Stat. 538), and the Willard Hotel became a part of the Pennsylvania Avenue Development Plan. The same methodology was employed in the present case. By denying the permits to Deltona, defendant has, in effect, made the property an adjunct to land it has already acquired by eminent domain, namely the Everglades National Park and the National Big Cypress Preserve, but without compensating Deltona.

The constitutional basis for regulation of navigable waters by the Federal Government is well established, *supra*, and need not be discussed further. The same is true of the legislative history of the intent of Congress to stretch the scope of its power to regulate commerce to its fullest extent. In particular, it will be noted that the basis for the statutes and regulations under which EPA (through the Corps of Engineers) exercises control over water quality is not Section 10 of the River and Harbor Act of 1899 but, rather, is Section 13 of the Refuse Act of 1899. In the latter act, Congress clearly intended to prevent use of the navigable waters as dumping grounds for noxious or harmful waste material. It had no intention whatever to require a property owner to refrain from removing a source of nutrients for the aquatic life in the navigable waters or to maintain roosting places for waterfowl or terrestrial life.

The exercise of regulatory authority by the EPA (acting through the Corps of Engineers) in this case amounts to a taking by inverse condemnation for which just compensation is mandated under the fifth amendment

to the Constitution of the United States since the value of Deltona's property has been so diminished as to render it valueless for any purpose other than conservation. Hence, Deltona must be compensated for the taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922).

XI. Contingent Dismissal

Inasmuch as Deltona has sought judicial review of defendant's denial of the permits sought by Deltona and that action is still pending in the United States District Court for the Middle District of Florida, there is still a possibility that defendant may yet see fit to issue the permits sought. In such event this case would be rendered moot. Accordingly, defendant will be given an opportunity to rescind its denial of the permits and proceed to issue the permits sought by Deltona.

If, as in the copending *Jentgen* case, Deltona had not sought judicial review of defendant's denial of the permits, there would have been no opportunity for defendant to issue the permits except upon new applications complying with the requirements in effect as of the date of the new applications. However, that is not the case and defendant may avoid liability in this case by issuing the permits on the basis of Deltona's applications, the denial of which is still subject to judicial review.

XII. Conclusion

In its order dated February 22, 1980, the court raised four areas of factual inquiry. The first (which appeared to be and is an undisputed fact) is whether a substantial amount (but not all) dredging and filling was to be done above mean high water (the normally and conventionally designated limit of Corps of Engineers' jurisdiction within the "navigation servitude"). The answer to that question is clearly established in the affirmative by the evidence now of record in the case.

The second point is whether there is a difference between the Government's regulatory authority under Section 10 of the River and Harbor Act of 1899 and the use of the common law "navigation servitude" concept by the sovereign to deny or reduce just compensation.

The third point was that all pertinent facts should be developed before grappling with the ultimate question of whether defendant is free from having to compensate Deltona for exercising the power of the sovereign over the "navigable waters." All facts necessary to a determination of the ultimate question are now of record in this case.

Fourth, and finally, the court was unclear at the time as to (a) the extent to which, if at all, the decision of the Corps rested on Section 404 of the Clean Water Act (FWPCA) and (b) the extent to which, if at all, the term "navigable waters" as used in Section 404 extends beyond the conventional definitions and understandings of the terms "navigable waters" and "navigation servitude." These inquiries are easily answered in the present case. The Corps would have granted the permits under Section 10 of the River and Harbor Act of 1899

and its guidelines for control of navigation and pollution of the navigable waters. It denied the permits in reliance solely on Section 404 of the Clean Water Act (FWPCA) and, in so doing, extended the term "navigable waters" beyond the conventional definition of that term and beyond the conventional understanding of the "navigation servitude."

Just as the courts, following *United States v. Causby, supra*, have carved out an "avigation servitude" to which certain airspace above private property may be subject, Congress and the executive branch have carved out an "ecological servitude" (or, more broadly, a "preservation servitude") to which all privately owned water-oriented property (whether interstate or intrastate) is subject for the purpose of controlling water quality.

In the present case, the provisions of Section 10 of the River and Harbor Act (more properly Section 13 of the Refuse Act of 1899) and Section 404 of the Clean Water Act (FWPCA) have been invoked to preserve the ecology in a manner not unlike that employed by Congress and the executive branch in carving out areas of wilderness as national forests and wildlife sanctuaries or in preserving buildings along Pennsylvania Avenue (including the Willard Hotel) as historical landmarks for the benefit of the general public. In the latter cases, just compensation was mandated for the taking. No less is called for in the present case in light of the facts as applied to the settled case law.

Deltona is entitled to compensation for the taking of its property by inverse condemnation and judgment is entered to that effect. Determination of the amount of recovery is reserved for further proceedings under Rule 131(c).

FINDINGS OF FACT

1. The Deltona Corporation (Deltona) is a publicly owned New York Stock Exchange listed corporation, organized under the laws of Delaware with its principal place of business in Dade County, Florida.

2. Deltona's primary business is (and has been for nearly 30 years) the construction, development, and sale of planned Florida communities for retired people of moderate income and second home communities for sale to the public.

3. In addition to Marco Island, Deltona has developed seven other planned communities in Florida. Prior to Marco Island, the Deltona entity built Deltona, which is near Deland, which now has 18,000 to 20,000 people in the community. The company then developed Spring Hill, St. Augustine Shores, and seven other communities.

4. Deltona is controlled by the Mackle family, whose family construction business was the predecessor to Deltona and which was started in Jacksonville in 1908. Prior to World War II, the company built homes in Delray, West Palm, and Miami, Florida. At the onset of World War II, the Mackle family construction business built homes for the Navy and then a Navy base at Key West during World War II. Immediately after the war, the company constructed GI houses for returning veterans and built some 6,000 or 7,000 in Florida.

5. In 1950, for the first time, the Mackle family started developing whole planned communities. The first such community was at Key Biscayne, Florida; the

second one was at Pompano Beach. Subsequent to that, the company built mostly water-oriented, planned communities at Port Charlotte, Port St. Lucie, and other coastal areas.

6. Deltona was formed in 1962 by the Mackle Brothers. In 1964, Deltona formed a joint venture called Marco Island Development Corporation (MIDC), which was 50 percent owned by Deltona, and 50 percent owned by a group of investors, including Barron Collier. About 3 years after formation of the joint venture, Deltona bought out Collier's 50 percent interest, thereby acquiring 100 percent control, and making MIDC a wholly owned subsidiary of Deltona.

7. In 1964, Deltona paid some $7,500,000 for a 10,000 acre parcel which included the lands at issue in this action, and obtained a title insurance binder in the amount of $6 million.

8. Deltona acquired title to all of the real property at issue in Barfield Bay and Big Key from the Collier interests in a deed dated June 9, 1964. This deed is recorded in the official records of Collier County, Florida, O.R. 170 at p. 169. All of these lands are located in Township 52S, Range 26E.

9. Deltona purchased the real property at issue in 1964, because it was a largely undeveloped area which, because of its topography, lent itself ideally to a "finger-fill" community for moderate income homes and moderate low density housing, where Deltona could dig canals and fill the land to a proper elevation. Mangrove growth covered most of the low-lying areas of the property. The necessity of obtaining a Corps of Engineers' permit

was not a factor in the decision to purchase or not purchase the property, but Deltona knew it might need a Corps of Engineers' permit because they were around water. During this period of time, however, issuance of Corps permits to dredge and fill was commonplace, more or less like issuance of a building permit by local authorities. Permits to dredge and fill in such estuarine areas were normally issued unless the work would adversely affect navigation.

10. At the time of its acquisition of the Barfield Bay and Big Key areas, on June 9, 1964, Deltona also got title to all submerged lands owned by the Collier interests in Township 52S, Range 26E. The Colliers had acquired title to submerged lands in and around Marco, and acquired all of the sovereignty lands owned by the State of Florida in and around Township 52S, Range 26E, out of the 3-foot contour and below mean high tide in some instances, and others out to the -5-foot contour below mean high tide. This title, subsequently transferred to Deltona, included sandbars and shallow banks, as well as submerged lands.

11. Deltona, in planning its Marco development, considered the obtainment of a submerged land deed to be very advantageous in being able to design and develop a waterfront oriented community, because Deltona believed that excavating this submerged land ownership would have the effect of enhancing navigation, thereby making the entire development highly desirable.

12. Deltona's title to the real property at issue came out of the United States into private ownership by three methods: direct patent from U.S. Government into private ownership; the Swamp and Overflowed

Lands Act of 1850, and thence out of the state into private ownership; and by patent to the State of Florida and then conveyed into private ownership from the State Board of Public Instruction. The source of title out of the U.S. Government for all the lands at issue is depicted in plaintiff's Ex. 248, a property derivation map.

13. Title to Swamp and Overflowed Lands Act passed to the State of Florida from the Federal Government in 1850. These lands were subsequently deeded from the state into the private ownership of Deltona's predecessors in title by the Trustees of the Florida Internal Improvement Trust Fund. (These lands are shown in green on plaintiff's Ex. 248.)

14. Deltona obtained both a title opinion and title insurance binder on the real property at issue.

15. A legal description of the lands for which Deltona seeks just compensation and which were owned by Deltona as of the trial date is contained in plaintiff's Ex. 321.

16. The legal description of the land for which Deltona seeks just compensation excludes certain areas south of State Road 92, running north along the side of Barfield Bay and the west side of Barfield Bay, which constitute an "upland" area (above the 6-foot contour) which was not part of Deltona's permit applications to the Corps. This exclusion was based upon an examination of the contours on the dredge and fill permit application map.

17. The 6-foot contours exclude "upland" areas immediately south of State Road 92, consisting of 91 acres and the 20 acres on the north side of State Road 92. No dredging or filling of navigable waters was indicated in this area in the dredge and fill permit applications that were denied by the Corps of Engineers.

18. The overall acreage of the real property at issue in this lawsuit is approximately 2,150 acres (approximately 111 acres of which are above the 6-foot contour). The Big Key area comprises approximately 1,116 and Barfield Bay consists of approximately 1,034 acres. These acreage figures appear in the Corps' 1976 Final Environmental Impact Statement, and do not constitute calculations based on the legal description of the lands Deltona alleges have been taken.

19. Deltona's Marco Beach Subdivision is located on the southwestern shore of Florida, Township 52S, Range 26E, Collier County, and it lies at the northern extremity of the Ten Thousand Islands chain, about 90 miles due west of Miami and some 10-15 miles south of the city of Naples. The real property at issue is bounded by the Gulf of Mexico on the west, Big Marco Pass on the north, and Marco River on the northeast and east.

20. Collier County is Florida's second largest land mass county, including 2,006 square miles (1,283,840 acres) of land. To date, only a small portion of this immense area has been developed. A special act has set aside many thousands of acres bordering the Everglades National Park as a virtually nondevelopable "buffer zone."

21. The predominant land use in the Marco Island vicinity is preservation and conservation, comprising more than 2.9 million acres (4,500 square miles). The major components of the preservation lands are the Everglades National Park (2,000 square miles) and the Big Cypress Preserve (2,450 square miles). Additionally, Rookery Bay Sanctuary, Aquatic Preserve G-14, Collier Seminole State Park, and that portion of lands already ceded to the state by Deltona as part of the Caxambas Sanctuary are dedicated to conservation and preservation uses.

22. A substantial amount of the land in south Florida (*i.e.*, the 12-county area within the jurisdiction of the United States District Court for the Southern District of Florida extending from Key West north to Vero Beach on the Atlantic Coast and north to Naples on the Gulf of Mexico coast) is either owned by or under the management of the State of Florida or the Federal Government, and practically all of south Florida's estuarine zone (*i.e.*, the areas where the Gulf of Mexico meets the rivers, swamps or marshes) lies within the boundaries of the Everglades National Park. Of the 3,000,000 coastal estuarine acres in Florida outside Everglades National Park, only 23,521 of those areas had been filled by 1970.

23. In 1964, Detona initiated master planning for the entire Marco Island community which, in conjunction with subsequently recorded subdivision plat maps, deed restrictions, zoning and other approvals, determined and depicted use of the lands at issue.

24. Deltona's master plan for the Marco Island community provided for a free-standing community

consisting of more than 12,000 single family sites, numerous multifamily sites, school and park sites, shopping areas, boating access and beach utilization areas, an arterial transportation system and other planned community facilities.

25. Marco Island proper contained in 1964 approximately 8,000 acres comprised of both upland property (*i.e.*, property above mean high water (MHW), and not subject to periodic tidal inundation) and property waterward of MHW, some of which was submerged lands. Much of the area above MHW and a much lesser area below MHW along the shores of the uplands was populated with dense mangrove growth. The mangrove growth provides food and habitat for a variety of marine and animal species indigenous to the semitropical conditions in the area.

26. The island portion of the master planned Marco Island community was approximately 6,800 acres, with approximately 12,300 single family homesites, multifamily sites for 16,000 units and commercial sites suitable to accommodate such a population.

27. As master planned, the Marco Island community was divided into five construction areas, namely Marco River, Roberts Bay, Collier Bay, Barfield Bay, and Big Key.

28. Deltona divided the land into five construction areas because it was not feasible to build the entire community in 3 years. It was a long-term, 15 to 20 years, project. The island was divided into parts for construction, sales, and contracts for sale for delivery

over a period of years. Although it was divided into five different areas, the master-planned Marco Island community was an integrated project.

29. Master planning for the five Marco Island permit areas was completed in 1964-65 and included the location of bulkhead lines, establishment of zoning criteria, deed restrictions, platting information, and an overall plan of development compatible with generally accepted design criteria. The original master plan was approved by county and state agencies. Sales commenced in 1965, and all five permit areas were virtually sold out (95 percent) by the end of 1970. Approximately 260 acres of the island have been designated for commercial and business use.

30. The proposed Marco Island development is a water recreation-oriented retirement and second home community and resort center. It is a typical waterway "landfinger," or "finger-fill," or "canalized" development intended to offer the amenities of a planned community, including low-to-moderate-density residential use, basic shopping services, full utilities, and land, water, and air access. A central feature of the project is the waterways which provide boating access to the homesites.

31. Deltona's concept in designing the Marco community involved increasing the water frontage of properties, thereby providing access to the open bays. Deltona anticipated 40 percent of the fill material required to develop the area would be excavated by dredging seaward of the previously established bulkhead lines. The remaining 60 percent of the fill would come from landward of the previously established bulkhead line.

32. Plaintiff's proposed development plan would disturb some bay bottom life and habitat, as well as substantial areas upon which mangroves grow.

33. The essence of Deltona's development plan was to be able to have a boat in one's back yard and be readily accessible to the surrounding neighborhood and navigable water areas. The dredging in Deltona's proposed plan would serve the purpose of allowing navigation to the lots around the perimeter and would also be a source of fill for the purpose of raising low-lying lands to a higher elevation.

34. It was Deltona's intention, later carried out in the earlier-developed Marco Island areas, to clear the upland mangrove areas and to dredge and fill those areas to establish the "finger-fill" or "canalized" development. Other vegetation, such as trees, lawns, and shrubbery were to be (and have been in already developed areas) planted in the filled areas. In order to carry out this intention, Deltona planned to establish navigable canals by excavating uplands and filling lowlands with material moved from the uplands or dredged from the bottoms of the inundated areas. This material to be placed in the fill areas would raise the elevations above flood or tidal levels so that houses could be built thereon.

35. Deltona cannot, as a practical matter, develop Big Key and Barfield Bay according to the plan submitted with its dredge and fill permit without using material dredged from the navigable waters of the United States. It could possibly obtain all the necessary fill from upland spoil sites, but it would still be necessary to use the dredged spoil resulting from the excavation of canals

as fill for the "fingers" upon which structures would be built.

36. After the master plan was finalized, the sequence of development approvals began with county zoning approvals which were obtained after a public hearing in July 1964.

37. After obtaining zoning, Deltona obtained bulkhead line approval. A bulkhead line in Florida is an approved engineering described line that delineates an area to which development is limited.

38. On July 21, 1964, Deltona obtained Collier County franchises for the construction, operation, and maintenance of both sewer and water systems for the entire Marco Island community, including Barfield Bay and Big Key. The sewer and water plans were designed by Deltona to service Barfield Bay and Big Key.

39. Between October 6, 1964 and June 22, 1965, subdivision plats for the Marco Island community, including Barfield Bay and Big Key, were approved by Collier County and recorded in the public records of Collier County, Florida. Plats of some additional areas outside of Barfield Bay and Big Key were subsequently recorded.

40. The recorded subdivision plats and accompanying plans depicted and described lots, roadways, canals (including dimensions and elevations), setback lines and other specific use designations, including residential, recreational, commercial, school and park utilizations of the real property at issue, and showed dimensions in precise engineering detail so that an

engineer or surveyor could go out on the ground and specifically locate, for example, the waterways.

41. In Florida, subdivision plats are prepared and submitted to the county. The county engineer reviews the plats and the other documents and attached plans and determines sufficiency of compliance with state laws. He then submits these plats to the zoning board which determines conformance with zoning approvals previously granted. Ultimately, the County Commission approves the plats and sends them for recordation in the public records.

42. Deltona was required by Collier County to post bonds to assure construction of improvements depicted in the various plats. In 1964 and 1965, Deltona posted subdivision development bonds with Collier County to guarantee construction of the platted subdivision improvements in Barfield Bay and Big Key.

43. In 1964 and 1965, Deltona recorded protective covenants and deed restrictions to limit actual use of the land through setbacks, architectural approval requirements, prohibitions of nuisances and square footages of dwelling units.

44. A total of approximately 56 public hearings occurred on the Marco project through early 1975.

45. The State of Florida has determined that the master planned Marco Island community has vested rights status. This means that no further state planning review may be applied by the state to the vested areas, including Barfield Bay and Big Key.

46. Under Deltona's plan, individual lots at the Marco Island community were to be purchased from Deltona for cash or on an installment basis, with purchasers making a down payment and subsequent installment payments over various periods of time, depending on the type of lot, location, and payment plan selected by the individual purchaser. In some cases, periodic payments on contracts would extend over a period of time as long as 8½ years from the date of sale.

47. Deltona's development plan involved permitting (*i.e.*, obtaining necessary local, state, and Federal approvals), and construction of the five areas sequentially over the 8½-year period so as to coincide with delivery of lots under its proposed sales plan.

48. Deltona received acknowledgment of its first land sales registration for the Marco Island development on December 30, 1964, from the State of Florida under Florida law and regulations. This encompassed plat Units 1-19. Between 1964 and 1968, it effected registration of all units through Unit 22. Thereafter, Units 23 and 24 were registered on March 16, 1970, all in compliance with applicable state law and regulations.

49. After enactment of the Federal Interstate Land Sales Full Disclosure Act on August 1, 1968 (which became effective on April 1, 1969), Deltona received acknowledgment of its registration from the Interstate Land Sales Office for the lands at issue on May 14, 1969.

50. As found by the District Engineer in his report, Deltona complied with both the Federal Housing and

Urban Development Agency (HUD) and State of Florida regulations regarding the disclosure of permit requirements in the registration statements furnished to prospective purchasers. (Plaintiff's Ex. 191 constitutes a compilation of actual land sales registration approvals received by Deltona from the Federal Government and numerous state agencies.)

51. In Big Key there are a total of 2,487 lots, and in the Barfield Bay area at issue, there are a total of 1,821 lots. As of April 1976, Deltona had entered into executory contracts to deliver 1,574 lots in the Barfield Bay area, and 2,366 lots in the Big Key area. As of April 1976, Deltona had 246 lots in the Barfield Bay permit area not under contract and 121 lots in the Big Key area not under contract. Respectively, therefore, 96 percent of the lots in Big Key and 86 percent of the Barfield Bay lots were under contract for sale as of April 1976.

52. The first construction area on Marco Island scheduled for development was Marco River. All necessary dredge and fill permits for this area, including permits to connect the canals to other navigable waters, were obtained in 1964:

(a) Deltona obtained the Collier County dredge and fill permit for Marco River on October 20, 1964;

(b) Deltona obtained the State of Florida dredge and fill permit for Marco River on October 22, 1964;

(c) Deltona obtained the Corps of Engineers dredge and fill permit for Marco River on October 27, 1964; and

(d) Construction commenced in the Marco River construction area of the Marco Island community in 1964.

53. In 1964, at the time of the Marco River permit, the Corps made inspections of Marco Island, including Deltona's sales office, and was given a full presentation of what Deltona was proposing to do. The Corps had thus been apprised of the nature of the development, including interior waterways, although there was no requirement that such presentation be made.

54. The Corps' practice in 1964 with regard to factors to be considered in dealing with whether or not permits would be issued was to consider navigation only and to issue permits if there would be no significant adverse effects upon navigation. There was but little coordination with the Fish and Wildlife Service at that time with respect to the effect of dredging and filling on fish and game.

55. The second construction area on Marco Island scheduled for development was Roberts Bay. This was also to be a "finger-fill" or "canalized" development which would result in removal of mangrove growth from dredged areas and replacement of mangrove growth in fill areas with roads, buildings, lawns and ornamental trees and shrubs. All necessary dredge and fill permits for this area were obtained in 1968 and 1969:

(a) Deltona obtained the Collier County dredge and fill permit for Roberts Bay on February 6, 1968;

(b) Deltona obtained the State of Florida dredge and fill permit for Roberts Bay on March 12, 1968; and

(c) Deltona obtained the Corps of Engineers dredge and fill permit for Roberts Bay on December 18, 1969, after the public interest test for issuance of permits was adopted by the Corps and applied in considering the application for permit.

56. In 1969, at the time of the first delays in Federal permitting of the Marco community and prior to the reversal of the judgment of the District Court by the Fifth Circuit Court of Appeals in *Zabel u. Tabb*, 430 F.2d 199 (1970), Deltona sought and obtained a legal opinion from its counsel that Corps of Engineers' permits could not be denied solely on environmental grounds.

57. During the processing of the Roberts Bay permit, Deltona was requested by the Corps to set down in writing the history of the Marco development to demonstrate that the proposed work would be in the public interest. In conformance with this request, Deltona prepared a detailed report, dated October 3, 1968. This report, encompassing 28 pages, included master plan maps of the island, a status of sales as of October 1968. (More specifically, Ex. 14 to plaintiff's Ex. 82, which was included, was a color photograph showing the sales status of each area of the island as of 1968, including sales in Barfield Bay and Big Key.)

58. On November 16 and 17, 1968, Under Secretary of the Interior Pautzke and his administrative assistant, Mr. Fielding, toured Marco Island, along with Corps representatives and were given a detailed presentation including all aspects of the development's history. The Department of the Interior, nevertheless, maintained its opposition to the granting of the permit.

59. During September 1969, Deltona's representatives had several meetings with Mr. Jordan of the Office of the Secretary of the Army (and his staff) who familiarized themselves with the situation, including not only the position of the Department of the Interior but also ongoing commitments by Deltona to continue development and sales that had been made. They were also aware of the existence of the submerged land deed. As a result of the meetings with Mr. Jordan's staff, the Secretary of the Army reached a decision which was reflected in conditions of the Roberts Bay permit issued by the Corps of Engineers in December 1969. In particular, conditions "bb" and "cc" of the permit, respectively, advised Deltona that granting of the Roberts Bay permit did not necessarily mean that future applications for work in the area would be similarly granted, but that continued sale of parcels landward of already established bulkhead lines (which included the Barfield Bay and Big Key areas) would be permitted. These conditions were accepted and relied upon by Deltona in its further development of the entire area.

60. As a condition of the Roberts Bay permit in 1969, the Corps also required (and Deltona submitted) an "overall plan for development of Deltona's holdings in the Marco vicinity." Deltona was also required to include in its submittal to the Corps its land use plans

for real property it owned outside of the platted Marco Island community.

61. As a condition of the Roberts Bay permit in 1969, the Corps required (and Deltona submitted) periodic progress reports on the status of the Marco Beach Subdivision, including the status and planning of the Barfield Bay and Big Key areas.

62. The Corps was aware in 1969 that substantial areas in Barfield Bay and Big Key had already been sold.

63. An express condition of the Roberts Bay permit, condition "cc," required Deltona to restrict future lot sales to those areas designated by the Corps of Engineers (which included the Barfield Bay and Big Key construction areas). This restriction implied in fact that Deltona was permitted to continue the sale of lots landward of the previously established bulkhead lines and it was also implicit that the same criteria would be applied in processing permit applications with respect to such areas in the event permits would be required in the future. The Corps acted within its authority in setting forth conditions which would be applicable to future applications for permits.

64. Condition "cc" included all of the Barfield Bay and Big Key areas. The Chief of the Regulatory Division of the Jacksonville District at the time the Barfield Bay and Big Key permits were being considered noted that "no other statement in the Marco Island historical record will have more impact on the final outcome of these applications, including the litigation

to follow the Corps' decision, than will Condition 'cc' of the Roberts Bay permit."

65. Deltona's interpretation of condition "cc" of the Roberts Bay permit was consistent with the letter that Deltona had written to the Corps and the maps that it had included, which are specifically referenced in paragraph "cc."

66. Deltona's president construed condition "cc" of the Roberts Bay permit as recognizing the fact that Deltona had platted the real property at issue, had filed bonds and was, in fact, entering into contracts for sale of lots to the public, and that condition "cc" authorized Deltona to continue selling those platted areas, but no other place. By this time Deltona had already platted Big Key and Barfield Bay.

67. Deltona's understanding of the purpose of condition "bb" in the Roberts Bay permit was that condition "bb" referred to permits yet to be obtained in then unplatted areas indicated on the maps that had been submitted to the Corps of Engineers. Deltona considered that all the conditions of the Roberts Bay permit were to be taken as a group, because many commitments were expected to be made by Deltona in the future as a consequence of the limitations placed on Deltona by the Secretary of the Army and the Corps of Engineers in granting the permit in connection with the Roberts Bay area.

68. Deltona's expectations as to those areas covered by condition "cc," which had already been platted and bulkheaded and on which development bonds had been posted, were reasonable in that, considering the

commitments that the company made and the conditions drafted by the Federal Government in the Roberts Bay permit, Deltona would not be denied the right to develop the entirety of Marco Island, including Big Key and Barfield Bay when the time came. By the time the Roberts Bay permit was granted, Deltona had already signed contracts for sale of over 60 percent (3,450) of the lots in the Big Key, Barfield Bay, and Collier Bay areas. Conversely, under condition "bb," Deltona was also aware that it might never get a permit to develop areas that had *not* been platted or were *seaward* of the bulkhead line as established at the time of condition "cc."

69. In accordance with condition "cc" of the Roberts Bay permit, Deltona had not offered for sale or advertised for sale any lands beyond those already platted, *i.e.*, Barfield Bay and Big Key, and Deltona has sold no such lands.

70. Deltona relied upon the conditions laid down by the Corps of Engineers in the Roberts Bay permit in proceeding with the development as planned, and continued to contract for the sale of property in the Marco Island development, including property in Barfield Bay and Big Key. In response to condition "cc," Deltona went ahead "full steam" by expanding its shopping centers and expanding the Marco Island development and continued sales of the real property at issue. By 1970, most of the lots in the Collier Bay, Barfield Bay, and Big Key areas were either sold or under contract for sale.

71. The third construction on Marco Island scheduled for development was Collier Bay:

(a) Deltona obtained the Collier County dredge and fill permit for Collier Bay on October 6, 1970;

(b) Deltona obtained the State of Florida dredge and fill permit for Collier Bay on October 29, 1972; and

(c) Deltona obtained a state certificate of water quality on April 10, 1974.

72. In connection with the issuance of the state dredge and fill permits, the Governor and Cabinet of the State of Florida (having cognizance of the policy of the Federal Government as expressed to the Governor of Florida in a letter addressed to him by Secretary of the Army Resor), undertook a comprehensive review of all Deltona's ownership and development plans in the Marco Island area, including the Barfield Bay and Big Key construction areas.

73. Based upon their finding that the completion of the entire Marco Island community was in the public interest, the Governor and Cabinet of Florida concluded that the dredge and fill permits for the two remaining construction areas, Barfield Bay and Big Key, should also be issued.

74. The state's land use agreement with Deltona is reflected in a memorandum of understanding dated July 16, 1971, an agreement to convey dated October 12, 1971, and articles of agreement dated November 29, 1972 (hereinafter "State Settlement Agreement").

75. Reubin Askew, at the time of the Corps' decision at issue in this case, was Governor of the State of

Florida, and in said capacity, on November 7, 1975, sent the Corps of Engineers a letter which noted that: "State approval of this complex development proposal represented a sincere attempt to balance the environmental, economic, legal, private and public equities involved. These carefully considered actions reflected my views then and they still do."

76. Deltona deeded 3 miles of beach on Kice Island to the state for nothing, as the required downpayment under the State Settlement Agreement and in anticipation of the Federal permits.

77. Deltona, in a written report, informed the Army Corps of Engineers of the State Settlement Agreement and forwarded copies of the Settlement Agreement papers to the Corps' office in Jacksonville. In an August 20, 1971 memorandum, the Assistant Secretary of the Interior, Mr. Reed, detailed the status of negotiations and meetings of Interior Department officials with state officials to discuss the Federal Government's assessment of the Settlement from the viewpoint of that agency. In this memorandum, Mr. Reed notes rather emphatically: *"I want to get Marco Island resolved."* The degree of Federal involvement and knowledge of the State Settlement Agreement is revealed in yet another Interior Department memorandum detailing negotiations and recognizing that the development of the Marco Island project was accomplished in a manner consistent with prevailing law. The views thus stated represent the position of a responsible official of the United States Government concerned with the environmental impact of the Marco Island development.

78. As a result of consummation of the State Settlement Agreement, Deltona believed that, even beyond condition "cc," of the Roberts Bay Federal permit, it had all the necessary state assurances that completion of the project was not going to be prohibited. Therefore, Deltona accelerated its development activities.

79. On December 1, 1972, pursuant to the State Settlement Agreement, the State of Florida issued dredge and fill permits for the Barfield Bay and Big Key construction areas of the Marco Island community.

80. Deltona was thereafter notified that, in accordance with the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) (33 U.S.C. §1344), water quality certification by the State of Florida would be required before Corps consideration of Deltona's dredge and fill permit applications for the Collier Bay, Barfield Bay, and Big Key areas.

81. On April 10, 1974, the Department of Pollution Control of the State of Florida certified that the issuance of Corps dredge and fill permit for the Collier Bay, Barfield Bay, and Big Key permit areas would not result in violations of applicable water quality standards, provided certain waterway design changes were made. Even though dissolved oxygen levels in the canals might fall below a 4 ppm[1] water quality level, such levels would be higher than those into which the mangrove detritis discharged into the tidal areas.

82. Deltona applied for Corps of Engineers dredge and fill permits for the Collier Bay, Barfield Bay, and

[1]Parts per million.

Big Key construction areas of the Marco Beach Subdivision on April 9, 1973. By that time about 95 percent of the lots in the three areas had been sold or were under contract for sale in reliance upon conditions "bb" and "cc" of the Roberts Bay permit and the Settlement Agreement.

83. After Deltona obtained the Roberts Bay permit in 1969 under the then existing state and Federal statutes and regulations, the Corps of Engineers' procedures for issuance of permits were substantially altered as a result of the passage by the U.S. Congress of several new laws, including the National Environmental Policy Act of January 1, 1970, and the Federal Water Pollution Control Act Amendments of October 18, 1972, *supra*, finding of fact 80. A certification from the State of Florida that the proposed work would not violate state water quality standards was made mandatory by Section 301 of the Federal Water Pollution Control Act, 33 U.S.C. §1311. Additionally, all "major Federal actions" having a potentially significant effect upon the human environment were subject to the requirement for development of a written statement assessing and, to the extent possible, quantifying the environmental effects of such proposed actions.

84. On July 6, 1973, Deltona was notified by the Corps of Engineers that consideration of the Collier Bay, Barfield Bay, and Big Key dredge and fill permit applications would require preparation of an environmental impact statement (EIS).

85. This same period (1973-75) also saw the promulgation of the "wetlands" policy by rulemaking

of the Corps and EPA which creates a rebuttable presumption against activities which would reduce or destroy wetland resources. This policy was applied retrospectively in 1976 by the Corps in making its decision on the 1973 permit application for Big Key, Barfield Bay, and Collier Bay.

86. As a part of the Corps' process of reviewing Deltona's permit application, the application was submitted to various Federal agencies for comment, including the Fish and Wildlife Service of the Department of the Interior (FWS), the Environmental Protection Agency (EPA), and the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration, Department of Commerce.

87. The FWS recommended that all three permits be denied for the reason that the destruction of some 2,100 acres of mangroves in the three areas (Collier Bay, Barfield Bay, and Big Key) would result in an irreparable loss of aquatic life habitat and Deltona's project did not provide any suitable measures to mitigate for this loss.

88. The EPA was opposed to the project because of its belief that the work would have an adverse effect on the habitat available for fisheries and its concern that Deltona would not be able to maintain applicable water quality standards for the area. The EPA position was based on conjecture, rather than concrete evidence.

89. The NMFS recommended denial of all three permit applications due to the adverse impact they thought the dredging and filling would have on the "nursery" areas at Marco Island which were believed

to provide some support for the major commercial and recreational shrimp and scale fish resources of south Florida and the adjacent waters of the Gulf of Mexico. NMFS maintained it objections throughout the permit review process and continued to object to the issuance of the Collier Bay permit.

90. On October 16, 1975, and thereafter on January 15, 1976, the District Engineer for the Jacksonville, Florida, District of the Corps of Engineers made a recommended decision to issue the Collier Bay permit and to deny the Barfield Bay and Big Key permits necessary to complete the Marco Island community.

91. On January 19, 1976, the Division Engineer for the South Atlantic Division of the Corps of Engineers disagreed with the District Engineer's determination with respect to his denial of the Big Key and Barfield Bay permits and recommended issuance of these two permits, as well as the permit for the Collier Bay area.

92. In the Division Engineer's recommendation for issuance of the Big Key and Barfield Bay permits, he specifically noted his lay opinion that denial of the permits would "constitute a substantial taking of property rights."

93. In February 1976, the Corps of Engineers issued its final environmental impact statement with respect to Deltona's application for dredge and fill permits for the Collier Bay, Barfield Bay, and Big Key construction areas.

94. It was because the mangroves in Collier Bay had, by 1976, lost most of their environmental values,

that the Chief of Engineers concluded that development could be allowed in that area to offset the denial of permits for work in the two highly productive mangrove forests in Big Key and Barfield Bay. The estimated loss of mangroves in the Collier Bay area was approximately 350 acres.

95. On April 16, 1976, the Chief of Engineers directed denial of the dredge and fill permits required to accomplish development of Barfield Bay and Big Key, the last two remaining portions of the master-planned Marco Island community. His decision was based on a determination that the mangroves located in the Barfield Bay and Big Key areas would be destroyed by the proposed development and that they should, therefore, be preserved in the public interest in accordance with the Corps of Engineers Interim Final Regulations and the EPA "interim final" 404(b) guidelines. At the same time, however, the permit for the Collier Bay area was granted, notwithstanding the potential loss of mangroves then growing in that area. The EPA did not exercise its statutory veto power with respect to the issuance of the Collier Bay permit, but there was a clear indication that the power would be exercised if the Barfield Bay or Big Key permits were issued.

96. The Chief of Engineers made determinations regarding the appropriateness or inappropriateness of the use of wetlands for residential housing, wherein he stated that it was his position that a housing/recreational development of the type envisioned in the Barfield Bay and Big Key applications was an unnecessary destruction of the wetlands resource. To this extent, at least, the decision to deny the permit was based on land use criteria.

97. The decision of the Corps to deny the Barfield Bay and Big Key permits was not without misgivings, as shown by the Office of the Chief of Engineers' 12-page trial position paper dated 29 March 1976 for issuing all Marco permits. This paper provides a clear rationale for the granting of all three permits, including a negation of any findings of factors of the public interest or any violation of EPA or Corps guidelines. However, Deltona does not contend that due process was not employed in reaching the final decision to allow the Collier Bay permit and deny the Big Key and Barfield Bay permits.

98. Commercial navigation will not be affected by the project and the proposed project would have provided recreational boating access for over 5,000 families.

99. At the time of denial, Deltona's desire to complete the project was no longer a mere matter of economics, but principally one of moral commitment to deliver what was promised.

100. Deltona proceeded with work under the permit for Collier Bay but challenged the denial of the permits for the final two areas of Marco Island (Barfield Bay and Big Key) in the U.S. District Court for the Middle District of Florida on the theory of denial of due process. Alternatively, it seeks just compensation in the Court of Claims on the theory that such denial, even with due process, constituted a taking of its property by "inverse" condemnation without just compensation.

101. In the issuance of the Roberts Bay permit in 1969, the Corps did not deny a permit for or prohibit continued sales by Deltona of real property in Barfield

Bay and Big Key. The Corps, however, was aware of the fact that the latter areas would require future dredging and development by Deltona waterward of the then established bulkhead lines or mean high water. The Corps, in spelling out the conditions of the Roberts Bay permit, was indirectly regulating the sale and use of Deltona's real property.

102. Federal officials, on numerous and frequent occasions prior to April 16, 1976, personally inspected the Marco development and repeatedly met with Deltona representatives at Marco Island, in Jacksonville, in Atlanta, in Washington, D.C., and at Hobe Sound, Florida, to discuss and review Deltona's plans.

103. The intensity and degree of early Federal involvement in the Marco project is illustrated in a February 28, 1969 memorandum to the Regional Director, Bureau of Sport Fisheries and Wildlife in Atlanta, Georgia, from the Director of that service regarding the Roberts Bay area of Marco Island:

> You were concerned that the provision of planning assistance to this corporation on the remainder of Marco Island prior to its application for Corps permits might force you into providing similar services to other developers. You were also concerned that the corporation might use a joint planning agreement with Interior and the State as a vehicle for contesting the establishment * * * of bulkhead lines at the mean high tide line in Collier County * * * we have reviewed this matter and do not share your concern over the quoted language in Mr. Layton's memorandum. We should be willing

> to provide advice to developers prior to their application for Corps permits, particularly when such assistance will be at the developer's expense * * *. We would expect that only the larger developers such as Marco Island Development Corporation would be interested in this degree of planning assistance * * *.

104. The ambivalent attitude of the Federal Government towards the Marco Island development is illustrated by a memorandum dated February 24, 1967, from the Regional Director of the Bureau of Sport Fisheries and Wildlife to the Director of that service in Washington, D.C.:

> The Marco Island development is a good example of providing the best protective devices for fish and wildlife with a dredge and fill operation * * *. We recommend that the example not be used as testimony. To do so would run the risk of the opponents of the legislation pointing up that the project was planned with the assistance of Federal and State fish and wildlife interests.

105. Apart from condition "cc," Deltona expected that permits for the Barfield Bay and Big Key would be issued because of the favorable reaction of Mr. Nathaniel P. Reed, Assistant Secretary of Interior for Fish and Wildlife and Parks. Mr. Reed indicated, in response to Mr. Mackle's inquiries about his reaction to Deltona's development of this land, that he could foresee no problem with the development.

106. Mr. Reed, at the time he made the statements of his attitude to Mr. Mackle, did not control the permitting function, but did have a strong voice in the matter as spokesman for the Department of the Interior. In his capacity as Assistant Secretary of the Interior, Mr. Reed thereafter filed written comments opposing issuance of the permits with the Chief of Engineers in a March 16, 1976, letter to the Corps of Engineers. In the meantime, in reliance on Mr. Reed's earlier representations, Deltona kept expanding the Marco Island development up to the time of denial of the permit for Barfield Bay and Big Key.

107. No other development has a history comparable to Marco Island because of several unique factors which set it apart, including submerged land deeds, progress of the development over a time of tremendously changing environmental laws and regulations, and the agreements with various agencies obtained during the course of the development, including condition "cc," which no other private residential development had.

108. Deltona's original acquisition cost for its real property in Barfield Bay and Big Key was $1,240,000, and the specific interest cost relating to a purchase money mortgage was approximately $283,000. Through April 1976, Deltona has paid $420,000 in real property taxes specifically relating to its real property in Barfield Bay and Big Key. Thus Deltona backed its reasonable expectations with substantial financial investments.

109. Deltona's permitting costs, through the denial date of the Corps permits, directly attributable to Barfield Bay and Big Key, accumulated to $1,607,000.

110. General administrative costs allocated by Deltona to the Barfield Bay and Big Key properties through the denial date total $7,500,000.

111. Deltona incurred approximately $352,000 in initial engineering and surveying costs relating to Barfield Bay and Big Key. The selling costs directly attributable to Barfield Bay and Big Key total approximately $15,800,000.

112. The nature of the community development business required that Deltona reinvest the funds received under sales contracts for lots in Barfield Bay and Big Key after paying sales commissions, planning and other costs, in order to enhance the value of that community and make it the growth area that it is today.

113. From its inception through April 16, 1976, the date of the Corps' decision on the Barfield Bay and Big Key permits, Deltona, as an investment-backed expectation expended or invested at Marco Island some $164 million, part of which was attributable to future development of Barfield Bay and Big Key. This is summarized in the category of capital expenditures of $17,200,000, construction expenditures relating specifically to single-family condominium construction of $93,800,000, and land development expenditures of some $49,400,000 in the developed areas.

114. The *cost* of the lands that Deltona has donated or committed to public purpose in the Marco Island area is approximately $2,900,000.

115. As of December 31, 1975, Deltona had installed 110.5 miles of watermains in the Marco Island community,

16,877 feet of force mains, and some 26 miles of sewer mains. As of that date, Deltona had also installed some 23.9 miles of gas mains in the Marco Island community.

116. As of July 1976, 90 miles of roads were completed or under construction on Marco Island, 94 miles of waterway bulkheading were in place, and some 160 total miles of waterways, sewer and gas lines had been installed on Marco Island. The layout, design, and capacity of such improvements and utilities was planned to provide for the requirements of Barfield Bay and Big Key in addition to the Marco River, Roberts Bay, and Collier Bay areas.

117. As of the date of the permit decision, Deltona had acquired a total of almost 20,000 acres and had constructed the largest hotel complex on the Gulf Coast, called the Marco Beach Hotel, two 9-hole golf courses, tennis facilities, park sites, office facilities, shopping centers, and community facilities. At the time of the denial, Deltona had constructed approximately 2,300 dwelling units in the Marco community. The capacity of these facilities was designed to accommodate the anticipated population of Barfield Bay and Big Key, as well as the other areas of the development.

118. It was reasonable for Deltona to purchase mangrove wetlands, such as those in Barfield Bay and Big Key up to 1969, with the expectation of filling and selling them, whether they were above or below mean high water since that was the prevalent method of development of the south Florida coastal properties.

119. Prior to 1970, mangrove wetlands were the most desirable property for developers to purchase,

because of the proximity to water. Developers tried to acquire as much of such property as possible, bearing in mind that the Corps had not theretofore exercised or asserted jurisdiction over the mangrove uplands above mean high water.

120. Until 1968, when the first objections were received from the Federal Government, it was reasonable for Deltona to expect the issuance of the three additional permits, because similar permits were issued or denied on the basis of effect on navigation only. The basic design of the community being to increase and enhance navigation in the surrounding area, the newly formulated objections of the Federal Government on grounds other than effect on navigation, were novel. There were no indications prior to 1969 that permits would be denied because of the effect of the development on the superabundant mangrove growth in the area.

121. Upon learning of the first difficulties of obtaining Corps of Engineers permits in 1968, Deltona sought and obtained a legal opinion from its counsel on whether or not Corps permits could be held up solely on environmental grounds. The legal opinion Deltona received in writing stated that a Corps permit could not be held up solely on environmental grounds as Corps permits related only to navigation, and further indicated the opinion that the Corps' refusal to issue such a permit would be a taking. This opinion was received several years before the decision to the contrary was handed down in *PFZ Properties, Inc. v. Train*, 393 F.Supp. 1370 (D.D.C. 1975).

122. There is no doubt as to the reasonableness of Deltona's actions in relying on condition "cc" of the

Roberts Bay permit and in relying on mean high water or the established bulkhead lines as the landward limit of Corps jurisdiction. In an August 9, 1974 letter (after the date Deltona filed its permit applications for Barfield Bay and Big Key) from the Acting Chief of Engineers to the Administrator of the Environmental Protection Agency, the Corps states emphatically that its regulatory authority under Section 404 of the FWPCA is limited to areas within the traditional navigation servitude and that the Corps' regulatory authority under that section must be molded within constitutionally permissible standards because (although the congressional power over the regulation of commerce is far-reaching), the Corps notes, that power is limited by the due process and taking clause of the fifth amendment. (This interpretation of the jurisdiction of the Corps under Section 404 was later refuted by the court in *Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975)).

123. Denial of the dredge and fill permits for the Barfield Bay and Big Key construction areas prevent Deltona from completing a substantial portion of the Marco Island Community which was originally planned as early as the mid-1960's and implemented to a "point of no return" by the time the Federal guidelines were changed.

124. The financial impact of the Corps' denial in 1976 was the principal factor which placed the Deltona Corporation on the border of bankruptcy. The denial created a cash requirement of some $75 million to cover refund demands by purchasers and eliminating some $35 million in cash inflow from receivables. Those cash problems compounded themselves in the inability

to pay all refunds demanded, inability ultimately to meet its loan commitments, and threatened Deltona's ability to pay its vendors, subcontractors, and others engaged in the development of the permitted areas.

125. Denial of the permits in 1976 meant that the Deltona Corporation could not meet its contractual obligations to deliver the property which customers in Big Key and Barfield Bay had contracted for and the potential of bankruptcy or insolvency for Deltona also put in jeopardy Deltona's ability to deliver other properties in other communities around the state.

126. In an attempt to solve the financial problems created by the denial of the Marco permits, the company made the total assets side of its balance sheet, primarily real estate, available to those customers in Barfield Bay and Big Key who sought refunds or exchange of their properties. In this program, Deltona set aside for possible exchange, beachfront property, commercial areas, and real property in its other communities around the state which were intended for development of future communities and future operations.

127. In 1977, Deltona came to the point where it was no longer able to pay interest on its bank loans. From that point on, Deltona was in what is known as a "work-out situation." In 1978, the banks also demanded under the threat of default that Deltona sell certain assets.

128. Trading of the company's stock was temporarily suspended at the request of the Securities and Exchange Commission on the day that notice came out that the permits were being denied, and adverse

financial effects of the Corps' denial also affected Deltona's stockholders. The stock was selling in the range of $80 per share in the early 1970's, but declined to three to four dollars per share after the denial. This decline was disproportionate to the performance of comparable securities during the same period.

129. After the Corps' decision denying the permits, the platted lots in Barfield Bay and Big Key had less value than they had at the time the property was purchased by Deltona. The only economically based value such property had at that time was its potential for reclamation by drainage and filling. The only value the property had, if retained in its virgin state, was for conservation purposes similar to that for which the mangrove swamps are utilized in Everglades National Park, *i.e.*, as breeding grounds for mosquitoes and other insects and aquatic life of doubtful or even negative economic value. The $25 value that the Collier County property appraiser placed on the Barfield Bay and Big Key lots after the Corps' denial not just adversely affected the property, but even rendered it less valuable than it was in 1964 when Deltona bought the property at the going market price.

130. The Corps itself recognized that extension of its regulatory authority beyond the traditional limits of the navigation servitude would have an effect on the economic value of wetlands and the Division Engineer who acted in this case expressly noted that permit denial, considering the extenuating circumstances, would, in his lay opinion, constitute a substantial taking of property rights which could constitute a case of inverse condemnation.

131. To the extent that there is any market for mangrove areas in the unfilled state, or mangrove wood (whether cut or standing), neither has had any calculable market value since April 16, 1976, except for conservation purposes.

132. An economic use of real property is one in which there is some economic return, *i.e.*, where the owner of the property is getting some economic return on his investment. The highest and best use is that which will yield the highest return on the owner's investment.

133. There have been attempts in Florida to utilize mangroves in their natural state, but all have proved economically infeasible in our economy. These include utilizing the leaves as chicken feed and developing charcoal out of mangrove woods. The difficulties of getting into the mangrove environment, cutting wood and getting it out make costs too high for our economy.

134. Mangroves are not known to be hunting grounds. Swimming inside mangrove areas, such as those at Barfield Bay and Big Key, would not be possible due to the prop root systems which are characteristic of mangroves. Although there may be fish in some tidal creeks that penetrate into the mangrove areas, there would not be any fish of any size in the semi-impounded black mangroves for the same reason.

135. The Government's assertion that only one use, that requested in the denied 1976 permits, has been denied, is erroneous, because of time and money constrictions imposed in obtaining permits for a major project. On controversial permit applications presented

to the Corps, the time requirements for just Corps' approvals from filing to a final decision at the Washington level would be at least 2 years and probably 4 years. There is precedent of a 5-year delay in permit processing.

136. It is Corps policy to accept only one application for each project as an entity. The Corps in the past had rejected Deltona's attempts to file separate applications for individual pieces of property. If Deltona had filed a series of alternatives, the Corps would have required Deltona to make a choice. The Corps would not sort through a variety of choices.

137. The mere removal of mangroves, if it does not involve dredging or filling below mean high water, does not require a permit from the Corps. If the mangroves were excavated, it might require a permit under Section 404 of the FWPCA, depending on the location of the roots. If they were cut above mean high water, the Corps would advise the applicant to be very cautious.

138. The Government's appraiser made certain use assumptions for purposes of this case; that is that dredging, filling, or other use of the property for establishment of a "finger-fill" or "canalized" residential development is prohibited by Federal statute and regulations (because such use would cause destruction of the mangroves).

139. There are no economically feasible plans for private development in the Barfield Bay and Big Key permit areas without a dredge and fill permit because the revenues which alternative land use plans would generate are simply not sufficient to warrant incurring

the costs associated with the developments or bearing the risks which are inherent in such plans.

140. To the extent that the Federal regulation of wetlands as of April 1976 prohibits destruction of mangroves, there are no economic uses which can be made of the lands in Barfield Bay and Big Key by Deltona or other private owners in those areas.

141. Since the granting of the Collier permit in 1976, the Corps has authorized no significant development of coastal mangrove areas in Florida, and has authorized no development comparable to Deltona's proposed development in coastal mangrove areas. Denial of dredge and fill permits by the Corps has been employed as a means of conserving mangrove growth for the public benefit without acquisition of title to the property.

142. The 111 acres of uplands in the Big Key and Barfield Bay areas (which can be developed without a permit from the Corps of Engineers) includes 63 acres of single-family zoned land, 46 acres of multifamily zoned land, and two acres zoned for a park. Prior to April 16, 1976, the multifamily land had a market value of $40,000 per acre or $1,840,000 for 46 acres. The single-family land had a market value of $12,000 per acre or approximately $750,000 for the 63 acres. Together the 111 acres of uplands were worth $2,590,000 prior to April 16, 1976. The remaining areas covered by the rejected dredge and fill permit application would have comparable or greater value if dredged and filled according to the plan submitted.

143. Mangroves grow abundantly between 25°N latitude (Tropic of Cancer—23½°N) and 25°S (Tropic

of Capricorn—23½°S) in coastal areas inundated from time to time by tidal water or fresh water sheetflow. They require saturated saline soil conditions to thrive, but some species may exist in dwarfed condition in mildly or non-saline soil.

144. The major part of Deltona properties involved in this case is covered with dense growth of "fringe" and "basin" mangrove forests which produce leaf litter, some of which is exported from uplands into navigable waters by tidal action and fresh water (rainfall) runoff. Five recognized types of mangrove according to Drs. Snedaker and Pool are illustrated by the following excerpts from their paper published in "The Role of Mangrove Ecosystems in the Maintenance of Environmental Quality and a High Productivity of Desirable Fisheries," Center for Aquatic Sciences, July 1973, pp. C-1-C-6:

MANGROVE FOREST TYPES AND BIOMASS

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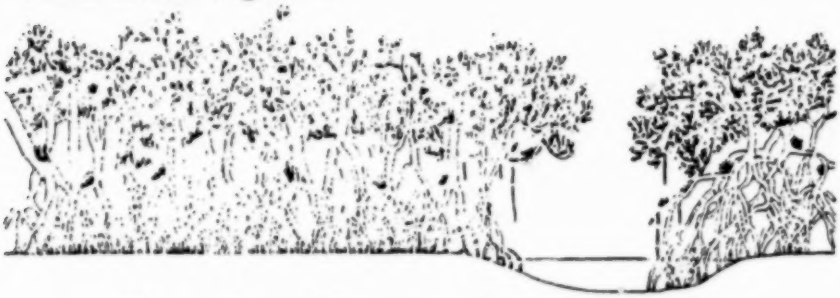
The major producers in mangrove ecosystems are the three mangrove species, *Rhizophora mangle* (red), *Avicennia nitida* (black) and *Laguncularia racemosa* (white). Contrary to reports in the early literature, these species do not occur in successive landward zones in the south Florida area; such examples are the exceptions. Throughout the area the red

mangrove tends to be the dominant species with black and white mangroves occurring in varying mixtures. Whereas there is no ubiquitous zonation pattern, there are apparent differences in the species composition and gross structure of the mangrove forests which appear to be strongly related to the periodicity of inundation by seasonal terrestrial runoff and tides. Five mangrove forest types are distinguishable based on these criteria and are briefly described:

Basin forests (figure 1)



These forest types are situated on the mainland in strand-like formations along the inland terrestrial drainages. As such, they are exposed to less saline water for longer periods of the year as compared to the more coastal types. Saline-water flushing probably occurs during extreme high tides and storm tides. These forests are particularly gnarled in aspect and have a noticeable epiphytic flora dominated by vascular air plants. Inland from the drainages, other trees (e.g., red maple and bays) occur in association. Quantitative studies have not been made in this forest type and are reported here only to distinguish the five basic types.

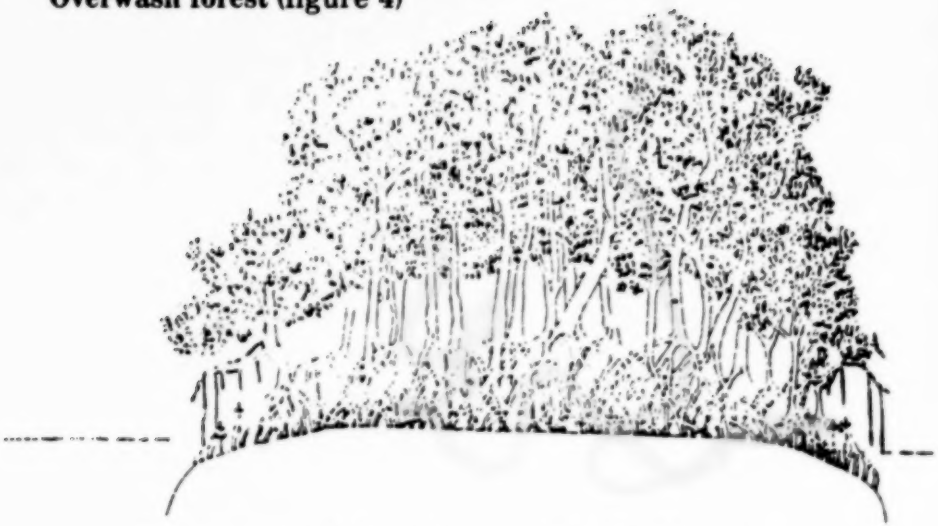
Riverine forest (figure 2)

The riverine forests occur along the major river drainages emptying into the numerous bays inland from the Ten Thousand Islands. They are located on the "floodplains", frequently separated from the rivers by shallow berms. These rivers are flushed by the daily rise and fall of the tides. During the summer wet season, water levels rise and the salinity drops. Flow velocities in these riverine forests are very low; no scouring or redistribution of litter is apparent. Organic export occurs primarily in the form of labile materials, products of decomposition.

Fringe forests (figure 3)

Fringe forests are situated along the slightly sloping shorelines of the terrestrial mainland and the larger islands. For the most part, they are exposed to the open bays (e.g., Fahkahatchee and Fahka Union) and receive some wave action, albeit slight. They are best defined on the larger islands whose elevations prevent daily overwashing by high tides. Tidal water movement is thus restricted to an in-out pattern which at any given point in the fringe is manifested as a rise and fall of the water level. Flow velocities are so small as to not flush large detrital debris into the bays on an outgoing tide. Organic export from the interior of the fringe forest occurs as small particulate and dissolved labile materials.

Overwash forest (figure 4)



The overwash forest occurs in an adjacent to the bays on small islands and finger-like projections of the larger land masses. In most instances they are situated almost perpendicular to tidal flow patterns and are overwashed with each high tide. The velocities are large enough to carry off all loose debris into the inner bays. As these materials are not redeposited by the retreating tides, there is an observable paucity of detritus in these forests.

Dwarf forests (figure 5)

This type is considered only to complete the tentative listing of south Florida mangrove forest types. The best examples occur in

southeast Florida (Dade and mainland Monroe counties). These are forests of scattered, stunted mangrove individuals, occurring as dominants or in association with other plant forms. Based on leaf-scar analyses the small mangroves are not juveniles but rather are relatively old, (ca. 50 years) mature specimens. Dwarfing or stunting is thought to be the result of extremely low nutrient inputs in both runoff and the tidal waters. Upland terrestrial drainage into these forest types is not readily discernible. Whereas they occur on low level terrain and are inundated by tides, the tide waters have marine characteristics including a relatively low dissolved nutrient load.

This classification based on topography and flooding characteristics is proving to be highly useful in developing input-output budgets of organic and inorganic material flows. Further studies on the specific hydro periods and salinity regimes may reveal the causes for the subtle differences in species dominance. Furthermore, each type appears to behave uniquely in the way in which net production is partitioned between export as dissolved or particulate organic material. The processes of decomposition, recycling and export are described qualitatively in this report.

145. The three principal mangrove species are: red, black, and white. Red mangroves have unique "prop root" systems which are partially external, exposed systems. Red mangroves grow most abundantly on the fringes of tidal (saline) waterways. Red mangroves usually

act as "colonizers." That is, substrata organisms attach to the prop roots and feed on the detritus exported from the interior mangroves, such as the black and white mangroves. Red mangrove prop roots also serve as a nursery area for juvenile aquatic organisms by providing them with cover and concealment, thus enabling them to escape predators while in the growing stage. Black mangroves may be identified by the presence of pneumatophores, pencil-like structures which thrust up from the ground providing aeration. White mangroves may be identified by the nodules on the leaves and by the whiteness of the stems. Black mangroves grow in portions of the forest where conditions fluctuate more widely than at the fringes of watercourses. The litter from the black mangroves, in particular, causes the water into which the detritus is exported to appear black.

146. There are six ecosystems in which mangroves exist. Each type of mangrove ecosystem varies significantly from the other, depending on location. One type of mangrove ecosystem is the overwashed mangrove forest which grows on land over which the tide flows daily. Overwashed mangrove ecosystems are usually dominated by red mangroves. The second type of mangrove ecosystem is the fringing mangrove ecosystem, which exists on the coasts of the sea (or gulf, as the case may be), and is exposed above water or submerged, depending upon periodic tidal conditions. Other types of mangrove ecosystems are the scrub, hammock, riverine, and basin. These ecosystems normally exist in the uplands or areas which are infrequently, if ever, inundated by tidal (saline) wash. The six mangrove forest types exist in a regional mosaic, but this diversity

in vegetation types has no significant value in terms of productivity of litter by the respective mangrove types.

147. All mangrove ecosystems are producers of litterfall from which organic substances are created by chemical action and biodegradation. The litterfall from mangroves in water-saturated areas, for example, decomposes by bacterial and chemical action into noxious products, such as hydrogen sulfide.

148. Mangrove ecosystems provide six major habitats for terrestrial and aquatic biological species: (1) tree canopy, (2) rot holes in branches, (3) soil and root surfaces, (4) interstitial spaces in soil, (5) permanent and semipermanent pools, and (6) channels. The tree canopy (1) provides nesting habitat for numerous species of birds which feed on fish and invertebrates which utilize the detritus in the food web of the ecosystem. Rot holes (2) in mangrove branches accumulate water and provide habitats for mosquitos and midge larvae which are grazed by birds and fish. The soil and roots (3) provide surfaces for support of both sessile and crawling invertebrates, some of which feed on mangrove detritus and may also serve as food sources for fish and larger predatory invertebrates. Common to the pools (5) are crabs, shrimps, mussels, amphipods, polychaetes, chironomid larvae and oysters. Channels (6) and areas of submerged vegetation provide a totally aqueous passageway for very small fish, most notably mosquito fish and killifish. These small fish may be fed on by birds and larger fish but have no economic or significant social value.

149. Mangrove ecosystems are "open systems" in that they may be affected by what happens upstream

of them and they may influence ecological conditions downstream of them.

150. Each mangrove forest type produces a different amount of litterfall, *i.e.*, the deciduous vegetation produced by the mangroves which drops to the forest floor. The dead organic matter which falls to the forest floor and decomposes is called "detritus." The detritus on the forest floor serves as food for the grazing organisms which inhabit the forest floor, and that which is not thus consumed is decomposed by microbes or by chemical action. Some of the loose and easily soluble detritus is exported from the forest to adjacent waters through tidal flushing or fresh water runoff and provides food for the organisms dwelling in those waters. Mangrove generated detritus which is neither consumed nor exported to the adjacent water body remains as decomposed organic matter, *i.e.*, compost. This material, however, is not collected or used commercially or otherwise as fertilizer and has negative economic value in view of its putrefaction. Mangrove ecosystems which are not subject to daily tidal flushing may, nevertheless, export dissolved organic matter in concentrated bursts as a result of runoff of heavy rainfall or flow of abnormally high tides. In such cases the putrefied matter is discharged into navigable waters as a pollutant.

151. There have been no arm's-length, fair market sales or purchases of mangroves, such as those in Barfield Bay and Big Key in Collier County, Florida, for use other than for conservation, since 1976.

152. Based on a feasibility analysis, potential land uses, costs, and economic feasibility of the Barfield Bay and Big Key permit areas, the Prudential Insurance

Company concluded that after April 16, 1976, it would not purchase or invest in coastal wetlands in Florida.

153. Mangroves were being bought and sold in the free and open market prior to April 16, 1976, when developers and investors were buying mangroves with the specific intention of putting them to some economic use. After April 1976, however, with one exception (monkey raising), there was no true fair market value for mangrove properties (a fair market for mangroves in which mangroves were being bought or sold) for private ownership or use. Another developer of Florida coastal mangrove properties, Punta Gorda Isles, stopped purchasing mangrove wetlands in 1971, because of concern with environmental problems.

154. For fair market value appraisal purposes, purchases by privately funded conservation groups, or state or Federal agencies, are not considered arm's-length fair market transactions largely in view of the threat of condemnation by the Government or pressure to donate or sell to nonprofit organizations at a deflated value to obtain tax advantages.

155. The Government's action rendered the sale of the real property at issue economically infeasible. It is doubtful if a value of $3,340,000 would be placed on the Barfield Bay and Big Key areas by defendant if those areas were to be condemned by the state or Federal Government for conservation purposes. Yet that is an approximation of the value of those properties if they could be put to their highest and best use.

156. Loss of the mangroves in Big Key and Barfield Bay, including loss of their production of organic matter,

would have no measurable or adverse effect on commercial or sport fisheries production in Marco Island area, its estuaries, or any portion of the Gulf of Mexico. This conclusion is reached on the basis of the fact that there are over 400,000 acres of mangroves in south Florida (excluding The Florida Keys) of which approximately 70,000 acres are in Collier County and approximately 2,200 acres in the area for which the permit was sought by Deltona. Moreover, approximately one-half of the 400,000 + acres is already protected by inclusion in the Everglades National Park.

157. "Special Treatment" ("ST") zoning is an overlay zoning classification which Collier County, Florida, adopted in October 1974. It applies to certain areas it considers to be environmentally sensitive. Areas classified ST cannot be developed without first obtaining a permit from the county. As part of the ST program, Collier County permitted the transfer of development rights ("TDR") from ST areas to nonsensitive or non-ST areas. Although originally the transfer of development rights was limited to nonsensitive lands contiguous to the ST-zoned land, amendments to the ST zoning ordinance later permitted transfer to any approved non-ST area within Collier County. Upon the county's approval of a transfer of development rights, the owner of the ST land is encouraged either to deed the ST land to the county or to agree that the land shall remain in its natural condition and shall never be developed. Under the Collier County ordinance, these TDR's are limited to one development unit per two acres of ST-zoned land. Although there is no prohibition against arm's-length transfer of the TDR's, there was no market for the sale of such rights prior to April 16, 1976. Only one sale of such rights has been recorded since April 16,

1976. All other transfers were between Deltona and Collier County.

158. Under the original ST ordinance established in October 1974 (and in effect as of the date of the Corps' decision in April 1976), the TDR provision was a new concept which involved a very cumbersome and time-consuming procedure, containing a clause that required transfer to contiguous non-environmentally sensitive land. As such, the TDR concept was viewed as very confusing and of questionable value to owners of ST land.

159. Prior to April 1976, there were no transfers of development rights involving mangrove property in south Florida. This is probably because, prior to that time, the need for transfer of development rights did not exist since most mangrove acres were at least somewhat developable and were not considered to be environmentally sensitive.

160. Deltona had an agreement with Collier County that when and if the final permit was issued by the Corps, the ST designation would be automatically removed with respect to Barfield Bay and Big Key.

161. Deltona's sale of three TDR's, subsequent to April of 1976, for other lands, for which it received in excess of $5,000 apiece, was not an arm's-length transaction.

162. The value of TDR's in Collier County is speculative, at best. Even the County Commission still has discretion as to the property to which they may be transferred. Also, the property to which they are

transferred, if not already properly zoned, may require rezoning. This also presents risks and uncertainty. Thus, the TDR's are of no value until they have been applied to a property other than that which is in the ST zone.

163. The Government's appraiser, prior to the instant case, had never attempted to appraise transferable development rights and was unaware if they existed anyplace in the country, other than Collier County. The court did not accept Mr. Miller as an expert in the appraisal of TDR's despite affording counsel the widest latitude possible to establish the qualifications to evaluate TDR rights, including letting counsel lead the witness.

164. The Government's appraiser based his attempted TDR valuations on a 1978 ordinance which was not even in effect as of the date of the April 1976 permit decision. In making his attempted appraisal, the Government's appraiser had no idea of the total number of TDR's in the market.

165. There is no real value to TDR's in Barfield Bay and Big Key. TDR's have no market value in Collier County, Florida, in the opinion of the official county property appraiser who is required to be knowledgeable as to land values and selling prices; hence, TDR's have never been appraised or valued for taxable purposes in Collier County, Florida.

166. The only value of mangrove property at Big Key and Barfield Bay either with or without TDR's is for conservation or preservation in its natural state. Purchasers of mangrove property range from state and Federal agencies, to conservation groups, to private individuals. The prices paid for the few properties sold

were substantially less than the prices paid for the same types of property when purchased in expectation of development and use as residential property.

167. Wetland resources in the Barfield Bay and Big Key area are valuable only to the public and private conservation groups, state and county entities if left in their natural state. The Federal Government, with the Everglades and Big Cypress acquisitions, has actually purchased wetland resources in south Florida to preserve them because of their presumed value to the public in their natural state.

168. Corps officials have admitted that the Section 404 wetlands program can be used as an alternative to fee acquisition. In a December 14, 1979 General Accounting Office Report (CED-80-14), the Comptroller General criticized the Park Services' acquisition of 570,000 acres of swampland in the Big Cypress for about $200 million. One ground of such criticism is that: "[T]he Park Service could protect this swampland through the Federal Water Pollution Control Act of 1972 which prohibits putting dredged or fill material into waters without authorization from the Army Corps of Engineers * * * . *Corps officials stated there was certainly the potential to use the permit program as an alternative to fee acquisition while still preventing development or damage to the resource.*" (Emphasis added).

169. As a result of the Corps' 1976 denial, Deltona had no other choice in its subsequent permit applications, but to designate mangrove wetlands in the Barfield Bay and Big Key areas as preserved areas; *i.e.*, in a status of non-use. There is no other use or value to these lands after 1976 except as bargaining material

for obtaining necessary state and Federal approvals of development plans in other areas. Thus the property is virtually held hostage by the Federal permitting authorities.

170. Mean high water (MHW) is a term used to designate the arithmetic average of the height above mean sea level (MSL) of all *high* tides over a period of approximately 18.6 years. Data is also available to determine the *number of times* the tide rose above MHW and the number of times it went below MHW. Mean high water at a given geographic location is determined by the establishment of interim tidal stations and measuring short-term simultaneous differences between the readings at those stations and the readings at the operating stations which were established more than 19 years prior to the current measurements. By applying known constants for the 19-year station to the shorter term stations, the equivalent of a 19-year value is interpolated. High water *mark*, on the other hand, is a term used to indicate the highest elevation reached by water, whether caused by tide, flood, or unique climatic phenomena.

171. In the Marco area, Key West is the basic 19-year station. In addition, there is an interim station at Naples, Florida (operating since the early 1960's), and a station at Marco Island (operating for 31 months). The National Oceanic Survey located two tidal stations at Marco Island in the vicinity of the Big Key and Barfield Bay permit areas, one at David Key, at the south end of Barfield Bay, and one at the bridge over Big Marco River at the intersection of Marco River and Goodland Bay to the east of the Big Key permit area.

172. The National Geodetic Vertical Datum (NGVD) is a more recently adopted datum used nationally as a reference for engineering projects and surveys. It is not, however, synonymous with mean sea level (MSL). The new datum was established to take into account terrestrial, as well as nautical elevations, and the changes which occur over the years between the level of the seas and land elevations. The difference between NGVD and MSL, however, is of little significance in the present case.

173. To obtain the elevation of mean high water above NGVD at David Key and Marco River requires a comparison between the elevation of the terrestrial benchmarks on the geodetic datum and the elevation of the mean high water datum measured at David Key and Big Marco River. Equivalent values for those stations above NGVD in 1980 were determined by defendant to be 1.86 feet at David Key and 1.89 at Big Marco River.

174. The tides in the Marco Island area are diurnal; *i.e.*, one high tide and one low tide each day. The range between low tide and high tide in the area is about 6 inches to one 1 foot.

175. At David Key, 59.4 percent of the high tides reached or exceeded the calculated mean high water elevation of 1.86 feet over the relatively short period the interim readings were taken; these tides remained at or exceeded that elevation 12.8 percent of the hours during the same period. At Marco River, 62.80 percent of the high tides reached or exceeded the calculated mean high water elevation of 1.89 feet. These tides remained at or exceeded that elevation 14.4 percent of the hours during the same period. High tides, however,

vary from day to day, month to month, and year to year, depending on the lunar phase or node at the particular time of measurement.

176. In May 1980, the Corps of Engineers commissioned a mean high water survey of the Big Key and Barfield Bay permit areas. A mean high water survey in a mangrove area is a time-consuming, expensive process which requires cutting of mangroves to lay transect lines over the property. The Corps' surveyors were unable to complete a survey from which a horizontal contour line (*i.e.*, a mean high water *line*) could be drawn around the entire property as of the time of trial. In any event, it is virtually impossible to draw a precise contour line to establish a mean high water *line* in areas of mangrove growth, not only due to the difficulty in laying transect lines, but also in following the highly irregular terrestrial configuration of the *shoreline*; *i.e.*, points of land touched by the tidal waters. Accordingly, the surveyors established points of mean high water along transect lines beginning every 1,000 feet along Florida State Highway 92, extending toward the water to 15 temporary tidal stations which had been established to ascertain mean high water values. Measurements were taken along these lines every 25 feet, as well as at critical points in break of topography.

177. Short term mean high water values at the 15 tidal stations were computed to be from 1.62 to 2.03 feet above NGVD. Transect lines cut across Big Key and Barfield Bay revealed substantial areas in the interior in which the elevation was below the calculated short term mean high water.

178. It is virtually impossible to establish a mean high water *line* in mangrove swamps. There are, however, substantial land areas above mean high water (the plane of the 18.6-year average of high tides) in Barfield Bay and Big Key. Although the areas below MHW (as defined above) are subject to the Federal navigation servitude, it is not possible to precisely determine a jurisdictional boundary in this area. The bulkhead lines on the maps of record are, therefore, relied upon as empirical designations of the boundaries between the Federal navigation servitude and private property.

179. Deltona's permit applications for Barfield Bay and Big Key represent mean high water (the plane) by contours around the entire perimeter of the property. Those contours were based upon a survey accomplished by Johnson Engineering Company of Ft. Myers which was completed in 1971.

180. The Johnson mean high water survey of the Barfield Bay and Big Key areas was done in accordance with the state of the art at the time it was performed and even to a degree of workmanship superior to that which was common to surveyors at that time.

181. The Johnson mean high water survey met or surpassed the Corps' regulations regarding the location of the mean high water effective in April 1976, which provided that in the absence of normal tide cycle information based on an 18.6-year period, less precise methods to determine mean high water, such as physical markings or comparison of the area in question with an area having similar characteristics, could be used to determine mean high water.

182. The Corps never asked Deltona for more information or supplemental information regarding mean high water as depicted on its April 15, 1974 permit applications for the Barfield Bay and Big Key areas. In both the Barfield Bay and Big Key applications, the question of mean high water information submitted by Deltona was not challenged by the Corps.

183. The National Ocean Survey, by letter, designated an elevation of 1.1 as the mean high water elevation in the Marco area in response to the Johnson inquiry in 1967. This was the proper MHW value for the Marco River station near the entrance of Big Marco Pass, north of Marco Island. The 1.1 value utilized in the Johnson mean high water survey was not erroneous value and it was the best information available at the time. A precise value cannot be determined, as a practical matter, taking into consideration the terrain, vegetation, and the empirical nature of the value itself. In any event, the difference of approximately 6 inches (0.5 foot) between the 1.1 foot value and 1.6 foot value would hardly be noticeable in mangrove swamp areas due to the irregularity of the terrain, tidal erosion, and accretion resulting from erosion of the uplands.

184. Southern Florida, the Keys included, contains 484,000 areas of mangroves: Collier County 70,000, and the permit areas 2,200, of which 400 acres are considered to be highly productive. There are approximately 230,000 to 250,000 acres of mangroves preserved in the Everglades National Park. Thus about half of the mangrove acreage is already owned outright by the Federal Government.

185. If the Big Key and Barfield Bay areas were dredged and filled in accordance with plaintiff's plans,

about 2,000 acres would be replaced by navigable canals and upland residential lots and streets landscaped with lawns and ornamental trees and shrubs. The areas from which the mangroves would be removed would generate less pollution and pollute surrounding waters less than the removed mangroves as a consequence of the water supply and sewage disposal systems which would be provided upon completion of 50 percent or more of the development. Moreover, the development would reduce the perennial mosquito nuisance and eliminate the source of noxious odors originating in the mangrove swamps.

186. On a strict area/acreage comparison, the loss of the mangroves in Barfield Bay and Big Key would constitute somewhat less than one-half of one percent of Florida's mangroves, (most of which exist within the Everglades National Park). There is very little likelihood of interdependence between the aquatic systems and aquatic organisms living and making their living within the Ten Thousand Islands and the Everglades National Park system and those living in the Marco, Barfield Bay and Big Key permit areas.

187. Although the elimination of mangrove in Deltona's Big Key and Barfield Bay properties would constitute a considerable loss on a local basis, the maps of Florida show that, on a statewide basis, this would not be a significant loss. Accordingly, it would be an even less significant loss on a national basis, taking into account the estuarine vegetation along the shores of Louisiana and Texas.

188. Although mangroves provide some food and habitat for a variety of species, they are not the sole

food source or sole habitat for any particular species. They do not perform any functions which are of value to the general public, but rather are a source of mosquito infestation and water pollution.

189. Mangroves, like other vegetation, are an aid in shoreline and bank stabilization, but since they are not truly aquatic species (such as seaweed, algae or kelp), they require a soil substrate in which to take root. Therefore, they are not capable of establishing land areas but, due to their intertwining prop root systems, may aid in stablizing and extending pre-existing shorelines.

190. The extent to which mangroves serve as buffers to protect inland areas from storms and hurricanes or to reduce the degree of damage inflicted by such storms depends on the height, age, and density of growth of mangroves in the path of the storm. In any event, such effect is minimal in the face of catastrophic hurricanes and is entirely ineffective beyond the area of the growth. The bulkheading and filling of the "fingers" behind the bulkheads is far more effective than natural mangrove growth in preserving the terrain from storm damage.

191. All three types of mangroves, red, black, and white, are found in the Big Key and Barfield Bay permit areas in varying percentages. The Big Key permit area is comprised of approximately 178 acres of red mangroves, 500 acres of mixed mangroves, which include the coexistence of blacks, reds, and whites, and 260 acres of predominately black mangrove forest. The Barfield Bay permit area is comprised of approximately 117 acres of red mangroves, 350 acres of mixed red,

black, and white mangroves, and 275 acres of predominantly black mangroves. The Big Key and Barfield Bay permit areas also include 111 acres of uplands which are virtually devoid of mangrove or other wetland vegetative species.

192. The Big Key and Barfield Bay mangrove system constitutes but 16 percent of the mangroves in the Marco Island area. Of that 16 percent, only a fraction of the litterfall would ever be consumed by the aquatic species inhabiting the area.

193. The normal zonation of mangroves is that black mangroves are predominantly above mean high water, while red mangroves traditionally occur near and have roots below mean high water.

194. Fringing mangroves are considered to be more valuable than interior mangroves, and black mangroves are considered to have lesser value in providing habitat. Generally, a semi-impounded black mangrove forest, which is an extensive part of Deltona's Barfield Bay and Big Key permit applications, is not very valuable in itself as a locale for wildlife or fisheries.

195. The Government has done no studies to demonstrate or quantify the productivity of mangrove growth in Barfield Bay and Big Key. The opinions expressed by the Fish and Wildlife Service official that the Barfield Bay and Big Key areas were productive were not based on any studies or data relating specifically to Barfield Bay and Big Key.

196. The whole field of mangrove technology, with particular reference to the role played by black

mangroves, is in a rather fluid state right now and there is disagreement among the experts. In 1976, there was a paucity of knowledge relating to the mangrove area above mean high water.

197. At least 85 percent of the commercial fish and shellfish harvested in the waters off the south Florida coast and in the Gulf of Mexico in the Sanibel and Tortugas grounds are estuarine dependent in the juvenile stage and derive their food from the vegetation in the Florida mangrove forests and seagrasses during that stage. Pink shrimp and mullet, which are harvested in open waters, represent 70 percent of the commercial catch of fish and shellfish in south Florida.

198. At present no one can quantify on a scientific basis the impact on fisheries of the loss of mangroves in Barfield Bay and Big Key. The Government has performed no scientific studies to determine whether areas such as Barfield Bay and Big Key or the surrounding areas are at their carrying capacity right now for pink shrimp and mullet.

199. The life cycle of most estuarine-dependent species is similar in that the adults spawn offshore and the young move into the estuarine nursery areas where they are afforded abundant food and shelter. Depending on the species, the amount of time spent in the estuarine nursery areas varies. In almost every case, the adults return to the offshore areas to spawn, thus completing the life cycle. A case in point is the pink shrimp, the most valuable of Florida's commercial fisheries. Spawning of pink shrimp occurs year round in offshore waters. After hatching, the young metamorphose through several larval stages and migrate toward the coast, assisted by

water currents. Entrance into estuaries usually occurs at the post-larval stage, and the young eventually inhabit all shallow water areas. Growth is rapid and maturing shrimp gradually move into deeper waters offshore to spawn. Staining and recovery studies demonstrated the role played by south Florida's estuaries as "nursery" areas for young shrimp and are later captured by offshore fishing fleets. The estuarine nursery grounds for Tortugas stocks extends from Florida Bay to at least Indian Key, and the "nursery" areas for the Sanibel grounds, from at least Indian Key to Pine Island Sound. Except for the spotted seatrout, which is not known to migrate but a few miles from the estuaries where it is raised, and the snook, for which little data is available, lengthy migrations probably occur. Notwithstanding the extensive dredging and filling which has taken place on the Gulf Coast of Florida, the total fish and shrimp catch has increased during each 5-year period over the last several decades.

200. Commercial catch statistics from the south Florida fisheries grounds for the 5-year period 1966-70 were analyzed to determine the percentage of catch composed of estuarine-dependent species by reviewing the life history of each species and listing the major species known to inhabit the estuaries during some phase of their life cycle. The annual harvests of these species were averaged and subdivided into the categories of "finfish" and "shellfish" and arranged in decreasing order by weight. The annual harvest averaged 36.4 million pounds worth over $10 million (dockside value) and represented about 85 percent of the catch and value of all fishery resources taken commercially in south Florida during the 5-year period. Striped mullet and pink shrimp were the two major crops, representing

70 percent of the weight and 79 percent of the value. Striped mullet and pink shrimp in the juvenile stage feed directly on mangrove detritus, and in the adult stage on nutrients available in the open waters of the coast and the Gulf of Mexico. These catches represent about 22 percent of the catch and 27 percent of the value of all commercial seafood caught in the State of Florida.

201. The presence of bird species, such as brown pelicans, feeding on a fishery source, would indicate a correlation or a relationship between such birds and the fisheries resource.

202. The ABC Islands, which Deltona gave to the State of Florida, contain a healthy population of birds, including the brown pelican, an endangered species, which first populated this area in 1969. Even though Deltona was building its development less than 1,000 yards away, the brown pelican population continued to increase to 500 nests, at which point it leveled off and has remained constant. At present there are about 1,300 birds or 7 to 8 percent of the total brown pelican population of Florida living at the rookery on the ABC Islands. There is no evidence that establishment of residential areas drives birds out of the area. Ibis and other birds even stroll undisturbed in the marshes along the Tamiami Trail between Miami and Naples.

203. Eighty-eight species of fish have been found in the existing Marco canals, in addition to shrimp, and 45 other species of organisms associated with the seawall community. These fish and other organisms were found during a 5-year study of the canal system. During the course of the 5-year study from 1971 to 1976, no substantial

changes were noticed in the marine or aquatic life in the Marco canals. Continual increased additions to species lists were observed. The existence, feeding, and breeding of fish in canals indicate that the habitat is suitable for them and that water quality is suitable for fish life in such canals.

204. A small percentage of Florida's total economy is attributable to sport and commercial fishing. Since much of the sports fishing is done by the many tourists who come to Florida for that purpose, they require housing in the vicinity of the fishing grounds. Lack of residential facilities in those areas would, therefore, tend to reduce or eliminate this contribution to the economy of Florida, however small. The commercial fishing industry, being more permanent and the people involved being less numerous than sports fishermen, would not be adversely affected by the increased population of sports fishermen since they are in pursuit of different species of fish and usually in different waters.

205. At the time Deltona planned and platted the canal system at Marco, there were no established governmental guidelines for developers regarding canal systems. At the time EPA studied the Marco canals, in August 1975, they themselves "were adrift with how to assess canal systems." In August 1975, the only guidance a developer could receive would be the statutes generally in terms of dissolved oxygen. In terms of dredging depth configuration, there were no guidelines then and there are none now.

206. In a dominant mangrove area like southwest Florida, the natural waters are in violation of state and

Federal standards quite frequently during the course of the year. Natural areas around Marco have dissolved oxygen well below the state standard. Dissolved oxygen consumption is highest and the actual available level is lowest in the undeveloped areas. In any event, water quality is not an issue in this case since the State of Florida, the controlling authority, has issued the necessary certification. Any dispute as to the adequacy of the state standards is a matter to be settled between the state and the Federal Government.

207. In 1976, and at the time of the Corps' permit decision, the state water quality standard had a clause which said that if natural waters had values below 4 ppm, the development did not have to have 4 ppm either.

208. EPA's canal studies showed that salinity stratification inhibits vertical mixing in the water column. No salinity stratifications were detected by EPA in the Marco canal system, but they have been found in other canal systems studies. The primary factor in the EPA experts' rating the Marco canal systems "pretty good" would be the fact that there was no stratification.

209. The Corps determined that water quality is not a major factor in the consideration of the Barfield Bay and Big Key permits because the applicant demonstrated that adequate precautions would be taken to minimize any water quality degradation. The water quality issue was also fully addressed in the Environmental Impact Statement.

210. The Corps made no specific determination of any specifically identifiable danger to the public

health that would be posed by the granting of the Barfield Bay and Big Key permits, and an intensive public health study of the Marco canals from 1972 until 1975, which was undertaken by the University of Miami Medical School to ascertain if there were any public health hazards posed by the Marco canals, determined that if the standards established in these studies were adhered to, there was no foreseeable public health hazard whatsoever from the Marco canal system.

ULTIMATE FINDINGS

1. Deltona is the owner of the subject real property.

2. Much of the subject real property is above mean high water, as measured by the 1929 NGVD.

3. All of the necessary Florida state permits required to develop the property were obtained from the State of Florida prior to filing the subject applications for Federal permits under applicable Federal statutes.

4. Deltona made substantial and far-reaching investments in the planned Marco Island community with the reasonable expectation that it would be able to complete development of the entire community, including the Barfield Bay and Big Key areas.

5. But for the denial of the Deltona applications for permits by the Corps of Engineers under Section 404 of the FWPCA, Deltona would have been able to complete, and would have completed, the Marco Island community in accordance with the master plan established in 1964.

6. Denial of the Big Key and Barfield Bay permits under the guidelines published by EPA under Section 404(b) of the FWPCA (33 U.S.C. §1344) exceeded Federal regulatory authority to control the navigable waters of the United States. Denial of the permit was an exercise of the eminent domain powers of the United States, which resulted in the taking of Deltona's property without just compensation.

7. Under the particular facts of this case, the economic impact of the application of Federal wetlands regulations and the resulting interference with Deltona's distinct investment-backed expectations have had an unduly harsh impact, not only upon Deltona and its use of its property, but also upon those who purchased lots from Deltona in expectation of establishing their homes on those lots.

8. Under the particular facts of this case, the Federal scheme of wetlands regulations as applied to plaintiff's ongoing development has denied plaintiff all reasonable, economically viable use of its property.

9. The Government's action, if allowed without compensation, has the effect of compelling Deltona to preserve the real property at issue for public benefit and environmental preservation purposes without compensation.

CONCLUSION OF LAW

Upon the findings and foregoing opinion, which are adopted by the court, the court concludes as a matter of law that plaintiff is entitled to recover and

judgment is entered to that effect. The amount of recovery is reserved for further proceedings under Rule 131(c).

If, however, within 60 days of the date of this opinion, defendant rescinds its denial of the permits sought by Deltona, defendant will file with the Clerk of the Court a certified copy of the permits issued, whereupon this case will be dismissed as moot.

APPENDIX "A"

IN THE UNITED STATES COURT OF CLAIMS

No. 370-76

(Decided August 19, 1981)

THE DELTONA CORPORATION

v.

THE UNITED STATES

William L. Earl, attorney of record, for plaintiff. *Fred R. Disheroon*, with whom was *Assistant Attorney General Carol E. Dinkins*, for defendant.

Before Friedman, *Chief Judge*, Skelton, *Senior Judge*, and Kunzig, *Judge*.

OPINION

KUNZIG, *Judge*, delivered the opinion of the court:

In this case, plaintiff contends that it has suffered an uncompensated taking as the consequence of federal regulation affecting its development of a planned

subdivision along the Gulf coast of Florida.[1] The statutes in question—§10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §403, and §404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1344—and implementing regulations thereunder, prohibit, *inter alia*, dredging and filling in navigable waters without the authorization of the Department of the Army. The latter, stressing environmental factors, has thus far steadfastly refused to grant plaintiff the permits it needs to finish its project. We hold that while plaintiff may indeed have sustained an economic loss, the loss is not such as to constitute a Fifth Amendment taking under the circumstances herein.

I. BACKGROUND

A. Applicable Statutes and Regulations: A Pattern of Stiffening Requirements.

1. *Section 10 of the Rivers and Harbors Appropriation Act of 1899*, 30 Stat. 1121, 1151, 33 U.S.C. §403 (1976) (Rivers and Harbors Act), provides in part:

> That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited . . . .

The section goes on to outlaw various structures in any navigable water of the United States except

[1]The court rejects the trial judge's recommended conclusion of law. While the trial judge also made findings of fact, all the findings necessary to the rendering of this decision are contained herein.

those initiated by plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. Section 10 then states that

> it shall not be lawful to excavate or fill, or in any manner to alter or modify the . . . capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [now the Army] prior to beginning the same.

See United States v. Republic Steel Corp., 362 U.S. 482, 484-485 (1960).[2]

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[2]Section 10 provides in full:

> That the creation of any obstruction not affirmatively uthorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

The Secretary of the Army has delegated to the Corps of Engineers the authority to issue or deny Section 10 permits. 33 C.F.R. §322.5 (1980). The Corps, in turn, has adopted the following definition of "navigable waters of the United States" in order to mark out the extent of its regulatory jurisdiction under the Rivers and Harbors Act:

> The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark . . . and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.

33 C.F.R. §322.2(a) (1980). *See generally* 33 C.F.R. §329.4 (1980).[3] The Corps notes that the "policies and criteria" reflected in its definition "are in close conformity with the tests used by the Federal Courts." 33 C.F.R. §329.3 (1980).

The Supreme Court has described Section 10 as a type of "general proscription" or "ban," the intent being "to benefit the public at large by empowering the federal government to exercise its authority over interstate commerce with respect to obstructions" in the navigable waters of the United States. *California v.*

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[3]"High water mark" is a term used to indicate the highest elevation reached by a body of water, whether caused by tides, flooding, or unique climatic conditions. "Mean high water mark" designates the arithmetic average of the height above mean sea level of all *high* tides over a period of approximately 18.6 years.

Sierra Club, ___ U.S. ___, ___, 49 U.S.L.W. 4441, 4443 (1981).

2. *Section 404 of the Federal Water Pollution Control Act Amendments of 1972*, 86 Stat. 816, 884, 33 U.S.C. §1344 (1976) (FWPCA), generally prohibits the "discharge of dredged or fill material into . . . navigable waters" absent a permit from the Army Corps of Engineers. *See also* FWPCA §301, 86 Stat. 844, 33 U.S.C. §1311 (1976).[4] The term "navigable waters" is defined by FWPCA as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7) (1976). It is now well settled that Congress, by adopting this 1972 definition, "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution," *Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975); *accord, e.g., Conservation Council v. Costanzo*, 398 F.Supp. 653, 674 (E.D.N.C.), *affirmed*, 528 F.2d 250 (1975), and intended a departure from the traditional tests used to delimit Corps jurisdiction under the Rivers and Harbors Act, *viz*, tidal waters extending to the mean high water mark and/or waters susceptible to use to transport interstate or foreign commerce. *See, e.g., Wyoming v. Hoffman*, 437 F.Supp. 114 (D. Wyo. 1977); *United States v. Holland*, 373 F.Supp. 665 (M.D.Fla. 1974). In other words, the intent was to cover,

[4]Section 404(a) provides: "The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." The companion provision, Section 301(a), reads: "Except as in compliance with this section and section . . . 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

as much as possible, all waters of the United States instead of just some.

Notably, the Corps—which has also been delegated the task of administering this program, *see* 33 C.F.R. §323.5 (1980)—defines "waters of the United States" to include "adjacent wetlands," 33 C.F.R. §323.2 (1980), and the courts have been in agreement.[5] *See, e.g., Avoyelles Sportsmen's League v. Alexander*, 473 F.Supp. 525, 531, 533 (W.D.La. 1979); *Conservation Council v. Costanzo*, 398 F.Supp. 653, 674 (E.D.N.C.), *affirmed*, 528 F.2d 250 (1975); *United States v. Holland*, 373 F.Supp. 665, 673-674 (M.D.Fla. 1974).

The FWPCA establishes a comprehensive program of water pollution research and control in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and, among other things, declares as a national goal the elimination of the discharge of pollutants into navigable waters by the year 1985. 33 U.S.C. §1251(a)(1) (1976); *see, e.g., Train v. New York*, 420 U.S. 35, 37 (1975); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 372-373 (10th Cir. 1979). Further, "a basic policy of the FWPCA is the protection of our nation's wetlands and the important functions they serve." *Avoyelles Sportsmen's League v. Alexander*, 473 F.Supp. 525, 533 (W.D.La. 1979).

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[5]The Corps defines "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. §323.2(c) (1980). The regulation indicates that "[w]etlands generally include swamps, marshes, bogs and similar areas." *Id.*

3. *The implementing regulations* adopted by the Corps of Engineers pursuant to its statutory authority have grown increasingly complex and rigorous since the late 1960's.[6] This, for us, is the key legal event in the case at bar.

Until 1968, the Corps administered the Rivers and Harbors Act solely in the interest of navigation and the navigable capacity of the nation's waters. However, on December 18, 1968, in response to a growing national concern for environmental values and related federal legislation, the Corps revised its regulations to implement a new type of review termed "public interest review." Besides navigation, the Corps would consider the following additional factors in reviewing permit applications: fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest.[7]

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[6]This short history is drawn from a general discussion of Corps regulation appearing at 42 Fed. Reg. 37122-37164 (1977).

[7]The "public interest review" received its first judicial test in *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), in which the court upheld the denial by the Corps of a landfill permit for fish and wildlife reasons (and not reasons related to navigation). In reaching its decision, the court reaffirmed the Department of the Army's position that it was "acting under a Congressional mandate to collaborate and consider all of these factors" when it reached its decision. The court stated:

> Governmental agencies in executing a particular statutory responsibility ordinarily are required to take heed of, sometimes effectuate and other times not thwart other valid statutory governmental policies. And here the government-wide policy of environmental conservation is spectacularly revealed in at least two statutes, The Fish and Wildlife Coordination Act and the National Environmental Policy Act of 1969. [*Id.* at 209.]

On April 4, 1974, the Corps published further revised regulations so as to:

a) incorporate new permit programs under Section 404 of the FWPCA;

b) incorporate the requirements of new federal legislation[8] by adding to the factors to be weighed in the public interest review, including: economics; historic values; flood damage prevention; land-use classification; recreation; water supply and water quality;

c) adopt further criteria to be considered in the evaluation of each permit application, including the desirability of using appropriate alternatives; the extent and permanence of the beneficial and/or detrimental effects of the proposed activity; and the cumulative effect of the activity when considered in relation to other activities in the same general area;

d) institute a full-fledged wetlands policy to protect wetlands subject to the Corps' jurisdiction from unnecessary destruction.

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[8]Among others: The Federal Water Pollution Control Act Amendments of 1972; Marine Protection, Research and Sanctuaries Act of 1972; Marine Mammal Protection Act of 1972; Coastal Zone Management Act of 1972; Endangered Species Act of 1973; Flood Disaster Protection Act of 1973; Historical Preservation Act of 1974; Deepwater Port Act of 1974. *See* 33 C.F.R. §§320.2-320.3 (1980).

The inauguration of the wetlands policy should especially be noted, as it plays a leading role in the forthcoming scenario.

The last general revision of Corps regulations occurred on July 19, 1977. The purpose was merely to simplify and reorganize the existing body of rules to make them more understandable. The finished product appears at 33 C.F.R. §§320.1-329.16 (1980).

B. Facts.

In 1964, plaintiff, Deltona, purchased for $7,500,000 a 10,000 acre parcel on the Florida Gulf coast with the intention of developing a water-oriented residential community, Marco Island. The property, then completely undeveloped, lay astride the mean high water mark and contained large areas of dense mangrove vegetation, including wetlands. Deltona's master plan called for more than 12,000 single family tracts, numerous multifamily sites, school and park areas, shopping districts, marinas, beaches and regular utilities. Structurally, the project revolved about the "finger-fill" or "landfinger" concept and would necessitate considerable dredging and filling as well as the permanent destruction of much of the natural mangrove vegetation.

Deltona divided Marco Island into five construction or permit areas to be built consecutively. These five areas, in order of scheduled completion, were Marco River, Roberts Bay, Collier Bay, Barfield Bay and Big Key. Each separate stage would take three to four years to complete. While partitioned for these limited purposes, in operation, the Marco Island community would be a thoroughly integrated, unified whole.

Because Deltona's proposed dredge and fill activities were to take place in "navigable waters of the United States" as that term is used in the Rivers and Harbors Act, it was required to obtain the proper permit from the Army Corps of Engineers before any of the work could legally get underway in 1964. Also, because its proposed dredge and fill activities were to take place in "navigable waters" as used in the FWPCA, Deltona was required after 1972 to obtain a permit from the Army Corps under that statutory scheme as well. Deltona's problems which culminated in the instant lawsuit stem from its inability to obtain all the permits which it needs to complete its project.

When in 1964 Deltona applied for a dredge and fill permit for the Marco River area, the Corps' policy, as we have seen, was merely to consider the likely adverse impact which issuance would have upon navigation. *See supra* at 5. In this case, the Corps routinely granted the necessary permit on October 27, 1964.

The second construction area was Roberts Bay. Deltona obtained its dredge and fill permit on December 18, 1969, this time pursuant to the so-called "public interest review" which had been adopted by the Corps a year earlier. *See supra* at 5. The permit, however, was issued subject to the following express conditions: first, Deltona's "understand[ing] that all permit applications are independent of each other and that the granting of this permit does not necessarily mean that future applications for a permit of permits in the general area of the proposed work by Marco Island Development Corporation or others will be similarly granted;" second, its "agree[ment] . . . not [to] advertise or offer for sale as suitable building lots parcels of land which (1)

are in whole or in part seaward of the mean high water line and which (2) could not be made suitable for the erection of residences or other structures in the absence of a Department of the Army fill permit that has not yet been issued."

Deltona applied for Corps of Engineers dredge and fill permits for the Collier Bay, Barfield Bay, and Big Key construction areas on April 9, 1973. By this time, the permit requirement imposed by §404 of the FWPCA had been added to that already imposed by §10 of the Rivers and Harbors Act. In a written decision dated April 15, 1976, the Chief of Engineers denied Deltona's application to dredge and fill in Barfield Bay and Big Key, while granting its application for Collier Bay.

The permit denials were premised upon "overriding national factors of the public interest." The decision indicated that "Corps regulation[s] . . . identify certain types of wetlands considered to perform functions important to the public interest."

> These include wetlands that serve important natural biological functions (including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species); wetlands set aside as sanctuaries or refuges; wetlands which are significant in shielding other areas from wave action, erosion, or storm damage (including barrier beaches); and wetlands that serve as valuable storage areas for storm and flood waters.

The decision continued: "A review of the permit file clearly indicates that the mangrove wetlands involved in these permit applications fulfill each of these functions in a most significant way." Consequently, under governing regulations, denial of the permits was mandated unless it could be shown that "the benefits of the proposed alteration . . . outweigh[ed] the damage to the wetlands resource, and that the proposed alteration [was] necessary to realize those benefits." The Chief of Engineers concluded that Deltona had failed to make the requisite factual showing as to both elements.[9]

By contrast, "[t]he permit file reveal[ed] that a significant amount of destruction ha[d] already occurred to the mangrove wetlands associated with the Collier Bay application" and that a "considerable amount of dredging and filling" had taken place, resulting in the creation of a large number of lots and approximately forty homes.[10] The Chief of Engineers wrote: "It is my position, therefore, that this area has been already so dedicated to development that it would no longer be in the public interest to preclude completion of that development."

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[9]The Corps was also concerned about the possibly adverse precedential impact of allowing Deltona to complete the destruction of the mangrove wetlands located on its property. Note that the administrative file clearly reveals that the proposed dredging and filling would not have had any adverse impact upon commercial navigation, the traditional criterion.

[10]The construction had occurred around 1971 at a time when there was some confusion concerning Corps jurisdiction over the particular tract involved. The tract was also closely associated with the more fully developed areas in Marco River and Roberts Bay. Overall, Collier Bay contained only a very small amount of mangrove vegetation.

Deltona quickly filed suit in federal district court challenging the legality of the permit denials under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1976). On January 14, 1981, the court ruled that the Corps of Engineers had acted reasonably and lawfully in denying Deltona the permits to dredge and fill in Barfield Bay and Big Key. *Deltona v. Alexander*, No. 76-473 (M.D.Fla. Jan. 14, 1981). The *validity* of the permit denials is therefore not before this court. Deltona does not take issue with this basic point.

Deltona notes with much vigor that prior to the adverse decision by the Corps of Engineers, it had obtained all the necessary county and state permits to go forward with the development of Barfield Bay and Big Key and had entered into contracts of sale covering approximately 90% of the lots in those two areas.[11] As a practical matter, however, it cannot consummate its plans without the federal permits. The question before this court is whether plaintiff has suffered an uncompensated taking as the consequence of federal regulation. Under the specific facts and circumstances of this case, and the tests enunciated by the courts, we conclude that plaintiff has not.

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[11]Under Deltona's plan, individual lots at the Marco Island community were to be purchased from Deltona for cash or on an installment basis, with purchasers making a down payment and subsequent installment payments over various periods of time depending on the type of lot, location, and payment plan selected by the individual purchaser. In some cases, periodic payments on contracts would extend over a period of time as long as 8½ years from the date of sale.

II. ANALYSIS

A. Basic Constitutional Principles.

The Just Compensation Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." We have stated that, "[p]roof of damage alone does not necessarily prove a taking." *Yazel v. United States*, 118 Ct.Cl. 59, 72, 93 F.Supp. 1000, 1003 (1950). Instead, " 'Only consummated acts which actually deprive an owner of property . . . of valuable existing property rights, or acts so definite in character as to . . . place [on the property] . . . a permanent servitude not theretofore existing' " may form the basis for taking, *Id., quoting, Matthews v. United States*, 87 Ct.Cl. 662, 721 (1938).

The ordinary taking occurs when a governmental entity formally condemns a landowner's property and obtains the fee simple pursuant to eminent domain proceedings. The courts, however, have often found takings outside the context of formal condemnation proceedings or transfers of fee simple, in cases where governmental action benefiting the public resulted in destruction of the use and enjoyment of real property. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 178-180 (1979) (navigational servitude allowing public right of access); *United States v. Dickinson*, 331 U.S. 745, 750-751 (1947) (property flooded because of government dam project); *United States v. Causby*, 328 U.S. 256, 261-262 (1946) (frequent low altitude flights of

Army and Navy aircraft over property). The cause of action then alleged is inverse condemnation.[12]

It is well established as a matter of law that government regulation can effect a Fifth Amendment taking. *See, e.g., Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 123 (1978) (no taking found on the specific facts of that case); *Benenson v. United States,* 212 Ct.Cl. 375, 388, 390, 548 F.2d 939, 947, 948 (1977) (taking found). The rationale, as stated by Justice Brennan, is that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas & Electric Co. v. San Diego,* ___ U.S. ___, ___, 49 U.S.L.W. 4317, 4325 (1981) (Brennan, J., dissenting).[13] While, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922), the principle generally applied is that "if regulation goes too far it will be recognized as a taking," *id.* at 415; *see San Diego Gas, supra,* 49 U.S.L.W. at 4324.

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[12]The term inverse condemnation refers to a cause of action by which "a landowner recovers just compensation for a taking of his property when condemnation proceedings have not be instituted." *United States v. Clarke,* 445 U.S. 253, 257 (1980).

[13]Justices Stewart, Marshall, and Powell joined Justice Brennan's dissent; Justice Rehnquist, writing separately, expressed general agreement with Justice Brennan's discussion of taking law. The opinion of the Court did not reach the issue addressed by Justice Brennan.

B. The Crucial Factor Herein and the Parties' Positions.

The crucial factor in this case is that since the late 1960's the regulatory jurisdiction of the Army Corps of Engineers has substantially expanded pursuant to §404 of the FWPCA and—under the spur of steadily evolving legislation—the Corps has greatly added to the substantive criteria governing the issuance of dredge and fill permits within its jurisdiction. Recall that when Deltona initially purchased the Marco Island property in 1964, the regulatory jurisdiction of the Corps was limited to "navigable waters of the United States" and the lone substantive criterion for the issuance of Corps dredge and fill permits was the likely adverse impact upon navigation. Pursuant to this relatively undemanding standard, Deltona routinely succeeded in 1964 in obtaining the first permit for which it applied. By 1976, when the Barfield Bay and Big Key applications were denied, the situation had been radically transformed. The Corps' jurisdiction now extended to all "navigable waters" and the substantive criteria for granting permits had been significantly stiffened. Deltona's particular stumbling block, as we have seen, was its inability to satisfy the Corps' recently inaugurated wetlands protection policy. The impact is self-evident. As the result of an unforeseen change in the law, Deltona is no longer able to capitalize upon a reasonable investment-backed expectation which it had every justification to rely upon until the law began to change.

Deltona's position in this litigation is as follows. First, it claims that it has been deprived of all economically viable use of its land. Second, it argues that even if this factual assertion is rejected, it has undeniably been

deprived of the highest and best economic use of its land and that this constitutes a taking.

The Government's position is quite the opposite. It maintains that Deltona has not been denied all economically viable use of its land and that Deltona's argument respecting "highest and best use" has no basis in the law. The Government generally asserts that whatever detrimental impact Deltona may have suffered, the injury falls well short of what is necessary to constitute a taking.

C. Tests for Determining Whether Regulation Effects a Taking.

"The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). It is frequently stated that the question whether a particular restriction effects a taking depends largely upon the particular circumstances of the case. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Generally speaking, the Just Compensation Clause preserves governmental power to regulate, subject to the dictates of "justice and fairness." *Andrus v. Allard*, 444 U.S. 51, 65 (1979); *accord, Penn Central Transp. Co., supra.*

While "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations," *Penn Central Transp. Co., supra*, the decisions of the

Supreme Court "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.' " *Id.* at 131, *citing, Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value). Similarly, the Court has branded as fallacious the "contention that a 'taking' must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel." *Penn Central Transp. Co., supra*, at 130 n.27. Instead, "the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Id.* at 131. In one of its most recent pronouncements, the Court crystallized its thinking as follows: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies a[n] owner economically viable use of his land. . . ." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *accord, Hodel v. Virginia Surface Mining and Reclamation Ass'n*, ____ U.S. ____, ____, 49 U.S.L.W. 4654, 4662 (1981); *Penn Central Transp. Co., supra*, at 138; *Benenson v. United States*, 212 Ct.Cl. 375, 388-389, 548 F.2d 939, 947-948 (1977). *See also Schad v. Borough of Mount Ephraim*, ____ U.S. ____, ____, 49 U.S.L.W. 4597, 4599 (1981). The *Agins* Court also commented that "the question necessarily requires a weighing of private and public interests." *Id.* at 261.

In applying the foregoing considerations, it is important to bear in mind the Supreme Court's admonition:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to

> determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel *as a whole*. . . .

Penn Central Transp. Co., supra, at 130-131 (emphasis supplied).

D. Application of These Tests to the Case at Bar.

In this case, we take as given that the revisions in the implementing regulations of the Army Corps of Engineers, and the entire body of federal navigational and environmental laws to which they give effect, substantially advance legitimate and important federal interests. We have every reason to believe that the Corps has been enforcing these new regulations on a uniform basis nationwide. Deltona will therefore share with other landowners both the benefits and burdens of the Government's exercise of its Commerce Clause powers. In assessing the fairness of the regulations, "these benefits must be considered along with any diminution in market value" which Deltona might suffer. *Agins, supra*, at 262.

Although we have accepted that the expansion of the Corps' regulatory jurisdiction and the stiffening of its requirements for granting permits have substantially frustrated Deltona's reasonable investment-backed expectation with respect to Barfield Bay and Big Key, this development neither "extinguish[es] a fundamental

attribute of ownership," *id.*, nor prevents Deltona from deriving many other economically viable uses from its parcel—however delineated. Indeed, the residual economic value of the land is enormous, both proportionately and absolutely. A few statistics will suffice. In the aggregate, Barfield Bay and Big Key contain only 20% of the total acreage of Deltona's original purchase in 1964 and 33% of the developable lots. All the necessary federal permits for the development of the remainder of Marco Island—Marco River, Roberts Bay, and Collier Bay—have been granted. If we focus solely upon the three construction areas which became subject to the new federal restrictions promulgated during the early 1970's—Collier Bay, Barfield Bay, and Big Key—the salient fact emerges that while Deltona has been blocked from going forward at Barfield Bay and Big Key, it has obtained all the necessary clearances for Collier Bay, a tract approximately 25% of the three areas together. Most striking, even within Barfield Bay and Big Key, there are located 111 acres of uplands which can be developed without obtaining a Corps permit and whose total market value is approximately $2.5 million. Deltona only paid $1.24 million for all of Barfield Bay and Big Key in 1964.[14]

Therefore, in the terms of *Agins*, *supra*, the statutes and regulations at issue in this case substantially advance legitimate and important governmental interests and do not deprive Deltona of the economically viable use

[14]Deltona also possesses Transferable Development Rights (TDR's) granted by the county. According to the *Penn Central* case, *supra*, at 137, such rights "mitigate whatever financial burdens the law . . . impose[s] . . . and, for that reason are to be taken into account in considering the impact of regulation."

of its land. Instead, Deltona's remaining land uses are plentiful and its residual economic position very great. Reduced to its essentials, this case merely presents an instance of some diminution in value. The Supreme Court, however, has squarely held that mere diminution, standing alone, is insufficient to establish a taking. *See Penn Central Transp. Co., supra*, at 131. Thus, "it cannot be said that the impact of general land-use regulations has denied [plaintiff] the 'justice and fairness' guaranteed by the Fifth . . . Amendment . . . ." *Agins, supra*, at 263.

Moreover, when Deltona acquired the property in 1964, it knew that the development it contemplated could take place only if it obtained the necessary permits from the Corps of Engineers. Although at that time Deltona had every reason to believe that those permits would be forthcoming when it subsequently sought them, it also must have been aware that the standards and conditions governing the issuance of permits could change. Deltona had no assurance that the permits would issue, but only an expectation. Indeed, five years after Deltona acquired the property, it was given notice that its expectancy might never come to fruition when it was told, in connection with the issuance of the permit for Roberts Bay, that "the granting of this permit does not necessarily mean that future applications for permit or permits in the general area of the proposed work by Marco Island Development Corporation or others will be similarly granted."

In *Penn Central Transp. Co., supra*, the Supreme Court rejected as "quite simply untenable" the contention that property owners "may establish a 'taking' simply by showing that they have been denied the ability to

exploit a property interest that they heretofore had believed was available for development . . . ." *Supra*, at 130. That is precisely this case. Deltona has been denied the ability to exploit its property by constructing a project that it theretofore had believed "was available for development."

While plaintiff may very well be correct in its alternative assertion that it has been denied the highest and best economic use for its property, it is obvious from the Supreme Court tests we have cited that such an occurrence does *not* form a sufficient predicate for a taking. In effect, the "highest and best use" argument is merely another way of saying that there has been some diminution in value, rather than the complete destruction of all economically viable uses of the property. The Court, however, clearly rejects the notion that diminution in value, by itself, can establish a taking. Notwithstanding the changed phraseology, plaintiff's alternative argument fails as a matter of law. *See, e.g., Carruth v. United States*, 224 Ct.Cl. ____, ____, 627 F.2d 1068, 1081 (1980); *William C. Haas & Co. v. City and County of San Francisco, Calif.*, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Oceanic California, Inc. v. City of San Jose*, 497 F.Supp. 962, 975 n.20 (N.D. Cal. 1980).

In *Agins, supra*, after the appellants therein acquired five acres of unimproved land in the city of Tiburon, California, for residential development, the city adopted new ordinances that modified existing zoning requirements. In particular, density restrictions permitted the appellants to build only between one and five single-family residences on their five-acre tract. Appellants

then filed an inverse condemnation action, alleging in the complaint that land in Tiburon had greater value than any other suburban property in California and that the ridgelands owned by appellants "possess magnificent views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands" in Tiburon. Rezoning "forever prevented [its] development for residential use . . . ." In consequence, the city had "completely destroyed the value of [appellants'] property for any purpose or use whatsoever . . . ." *Id.* at 258. Upon appeal from rejection of the inverse condemnation claim at the state court level, the United States Supreme Court affirmed, holding that there had been no taking. It stressed the substantial governmental interests served by the zoning law and the fact that appellants were still permitted to build as many as five houses in the area. *Id.* at 261-262. *Agins* well illustrates the very difficult prospect which any plaintiff faces in a regulatory taking case. We find nothing in the case at bar which would justify a different result than that in *Agins.*

We are not insensitive to the fact that the permit denials have placed Deltona in a highly difficult situation, legally and financially. The Fifth Amendment, however, does not provide a solution. In addition, Deltona certainly bears a great deal of responsibility for its current plight by having rushed into many land sale contracts before having obtained all the necessary federal permits which would enable it to meet its obligations. Note

that Deltona had been specifically warned against this when it obtained its Roberts Bay permit in 1969.[15]

In sum, we have rejected plaintiff's argument that the denial of highest and best use can constitute a taking. We have found that subsequent to Deltona's purchase of the land in question, a significant change occurred in the statutes and regulations affecting its land-use, and that this development did have a significant impact upon the values incident to Deltona's Marco Island property. However, in view of the many remaining economically viable uses for plaintiff's property, and the substantial public benefits which the new statutes and regulations serve to bring about, we have concluded that no taking occurred.[16]

III. CONCLUSION OF LAW

The court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is dismissed.[17]

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[15]Because of our ultimate disposition of this cause, it is unnecessary to consider the impact of the federal navigational servitude upon the issues herein. *See generally Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[16]All other arguments raised by plaintiff, although not directly addressed by this opinion, have been considered and found to be without merit.

[17]In a highly related context, *see Jentgen v. United States*, Ct.Cl. No. 415-77 (slip opinion of Aug. 19, 1981), issued the same date as this opinion.

IN THE UNITED STATES COURT OF CLAIMS

October 2, 1981

ORDER

PER CURIAM: IT IS ORDERED that the motions of the parties, as set forth below, for rehearing *en banc*, rehearing, reconsideration, to alter, amend or vacate judgments and orders of the court and relief therefrom, or for other relief pursuant to Rules 7(d), 151(b) and 152 are DENIED:

370-76 THE DELTONA CORPORATION

Plaintiff's motion for rehearing, filed September 2, 1981.

[FRIEDMAN, *Chief Judge*, SKELTON, *Senior Judge*, and KUNZIG, *Judge*]

[*Opinion of August 19, 1981*]

C. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

1. UNITED STATES CONSTITUTION, AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. SECTION 404, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 33 USCA §1344 (1975)

Permits for dredged or fill material

SEC. 404. (a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which

guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

3. SECTION 401, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 33 USCA §1341 (1975)

SEC. 401. (a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge

originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 306 and 307 of this Act. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, and there is not an applicable standard under sections 306 and 307, the State shall so certify, except that any such certification shall not be deemed to satisfy section 511(c) of this Act. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. . . . No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

4. SECTION 10, RIVERS AND HARBORS APPROPRIATION ACT OF 1899, 33 USCA §403

Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited;

and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

5. REGULATIONS OF ARMY CORPS OF ENGINEERS

(a) Definition: "Navigable Waters of the United States," 33 C.F.R. §209.120(d)(1) (40 Fed. Reg. 31324)

(1) *"Navigable waters of the United States."* The term, "navigable waters of the United States," is administratively defined to mean waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate commerce landward to their ordinary high water mark and up to the head of navigation as determined by the Chief of Engineers, and also waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the Pacific Coast).

(b) Definition: "Navigable Waters," 33 C.F.R. §209.120(d)(2)(i)(b) and (d) (40 Fed. Reg. 31324)

(2) *"Navigable waters."* (i) The term "navigable waters," as used herein for purposes of Section 404 of the Federal Water Pollution Control Act, is administratively defined to mean waters of the United States including the territorial seas with respect to the disposal of fill material and excluding the territorial seas with respect to the disposal of dredged material and shall include the following waters:

* * *

(b) All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. "Coastal wetlands" includes marshes and shallows and means those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction;

* * *

(d) All artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters, landward to their ordinary high water mark.

(c) Favorable State Determinations, 33 C.F.R. §209.120(f)(3)(iii) (40 Fed. Reg. 31327)

(iii) If a favorable State determination is received, the District Engineer will process the application to a conclusion in accordance with the policies and procedures of this regulation. In the absence of overriding national factors of the public interest that may be revealed during the subsequent processing of the permit application, a permit will generally be issued following receipt of a favorable State determination provided the concerns, policies, goals, and requirements as expressed in paragraphs (f)(1) and (2), above, the guidelines (40 CFR 230), and the following statutes have been followed and considered: the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archaeological Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research, and Sanctuaries Act of 1972; and the Federal Water Pollution Control Act (see paragraph c, above).

(d) Corps Policy Regarding Wetlands, 33 C.F.R. §209.120(g)(3)(i) and (iv) (40 Fed. Reg. 31328)

(3) *Effect on wetlands.* (i) Wetlands are those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage. Generally included are inland and coastal shallows, marshes, mudflats, estuaries, swamps, and similar areas in coastal and inland navigable waters. Many such areas serve important purposes relating to fish and wildlife, recreation, and other elements of the general public interest. As environmentally vital areas, they constitute a productive and valuable public resource, the unnecessary alteration or

destruction of which should be discouraged as contrary to the public interest.

* * *

(iv) Unless the public interest requires otherwise, no permit shall be granted for work in wetlands identified as important by subparagraph (ii), above, unless the District Engineer concludes, on the basis of the analysis required in paragraph (f) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits.

D. PERTINENT DOCUMENTS AND EXHIBITS FROM THE RECORD BELOW

1. EXCERPTS FROM CORPS DECISION-MAKING DOCUMENTS (FROM ADMINISTRATIVE RECORD)

a. District Engineer's Comments Regarding Navigation, Water Quality, and Deltona's Sales (Vol. I, Incl. I, pp. 4, 6, 12)

a. *Navigation:* Commercial navigation will not be affected. The proposed canal systems would provide recreational boating access for the over

5,000 families and their guests who would ultimately be living in the three permit areas.

* * *

g. *Water Quality:* The State Department of Pollution Control issued water quality certification on 10 April 1974. To secure the certification, Deltona had to make substantial changes in the canal configurations to improve circulation. Deltona reports the cost of these changes will be in excess of 2.2 million dollars over the pre-certification plans. EPA conducted water quality studies in the development but to date has not provided any meaningful data to show that water quality will be seriously degraded by the proposed project. Their letters of 23 June 1975 and 2 October 1975 are included with inclosure 6. In my opinion, water quality is not a major factor in the consideration of t' ese applications. The applicant has demonstrated o my satisfaction that adequate precautions will be taken during and following construction to minimize water quality degradation. The water quality issue is fully addressed in the EIS.

* * *

The opponents to the granting of the permits claim that the applicant has continued to sell lots in the development for the purpose of generating a "hardship" argument to support future issuance. I have rejected that argument. Deltona Corporation complied with both HUD and State of Florida regulations regarding the disclosure of permit

requirements in the registrations statements furnished prospective purchasers (see Incl 14).

b. Division Engineer's Statement That Permit Denial Would Render Deltona's Property Practically Worthless And Would Amount To A Taking (Vol. V, Incl. VI, p. 36)

e. The property in question, if not further developed, will be *practically* worthless from the point of view of the applicant and other parties having an interest in this property. The applicant proceeded in good faith with planning and partially constructing the planned community, of which these permits areas are an integral part, during a time when environmental laws were changing rapidly. At all times, the Federal Government, through the Corps, was aware of the work the applicant was doing and planned to do as a result of the submission to the Corps of his total planned community and schedule of completing the work.

10. The applicant immediately stopped all work in the Collier Bay area on being notified that the Corps of Engineers thought that the work required a permit. For the Corps to refuse to issue a permit to this applicant for these areas would constitute a substantial and unwarranted taking of property rights. This appears to be what the last two clauses of paragraphs 230.5(b)(8)(ii)(a) of the EPA guidelines above were designed to prevent by injecting a weighting of environmental concerns against undue and unwarranted taking of property rights.

11. The denial of these permits, considering the above extenuating circumstances, would impose a great hardship on the applicant and constitute a substantial taking of property rights. This could constitute a case of inverse condemnation if the permits for these areas are denied.

c. Chief of Engineer's Statement Commending Deltona For Its Response To The Environmental Movement (Vol. V, Incl. VII, p. 43)

(9) In reaching my position on these two applications, I have not been unmindful of the fact that this development was conceived and master planned in 1964, that permits were applied for and received in accordance with the planned states of development, and that thousands of individuals have purchased portions of this mangrove wetland forest in anticipation of its being converted into fastland on which their private residences could be built. Most of these lots were sold, of course, before the environmental movement gained a foothold in this Nation, and the appreciation and concern for our dwindling natural resources became significant. Indeed, I believe the applicant is to be commended for responding to this environmental movement as the permit file so indicates.

2. CONDITIONS "cc" AND "bb" OF THE ROBERTS BAY PERMIT

(cc) That the permittee recognizes that the Department of the Army considers that its jurisdiction extends to the mean high water line and requires individuals or firms wishing to conduct

dredging or filling operations seaward of the mean high water line to apply for appropriate Department of the Army permits prior to initiating any such work. Permittee agrees that it will advertise or offer for sale to the general public only parcels of land landward of bulkhead lines that have already been established by the State of Florida [The bulkhead lines which have been established are set forth in Exhibits A-1 and A-2 which were inclosed with the Marco Island Development Corporation letter of November 25, 1969 to Colonel John F. McElhenny, District Engineer. Exhibit A-2 shows the bulkhead line for the "Rookery Bay" area. The bulkhead line for Marco Island itself is outlined in brown (Marco Island sold area) in Exhibit A-1. No other bulkhead lines have yet been established.] and for which a plat and suitable performance bonds have already been filed with the county or will be filed within four months from the date of this permit. As to all other areas, permittee agrees that it will not advertise or offer for sale as suitable building lots parcels of land which (1) are in whole or in part seaward of the mean high water line and which (2) could not be made suitable for the erection of residences or other structures in the absence of a Department of the Army fill permit that has not yet been issued.

(bb) Permittee understands that all permit applications are independent of each other and that the granting of this permit does not necessarily mean that future applications for a permit or permits in the general area of the proposed work by Marco Island Development Corporation or others will be similarly granted.

UNITED STATES GOVERNMENT
Memorandum

AIR MAIL

DATE: February 24, 1967

TO: Director, BSF&W, Washington, D.C.

FROM: Regional Director, Atlanta, Georgia

SUBJECT: Marco Island, Florida (reference Mr. McBroom's memo of February 21, 1967)

The Marco Island development is a good example of providing the best protective devices for fish and wildlife with a dredge and fill operation. The map you refer to is not truly representative of a usual finger fill process. The picture on page 9 is more representative of the actual condition for this particular project.

We recommend that the example not be used as testimony. To do so would run the risk of the opponents of the legislation pointing up that the project was planned with the assistance of Federal and State fish and wildlife interests.

/s/ WALTER A. GRESH
Walter A. Gresh

FEB 28 1969

Regional Director, BSF&W, Atlanta, Georgia

Assistant
Director

Roberts Bay area, Marco Island, Florida

In your memorandum of February 14 you questioned language in Mr. Layton's memorandum of February 3 for the record on the above subject which reads as follows:

> "The letter of intent would include . . . (2) provision for joint planning for subsequent development of other areas of Marco Island, which would be the subject of future permit applications, between the Department of the Interior, Marco Island Development Corporation, and the State of Florida, at the expense of the Corporation to assure the preservation and retention of such natural shoreline as deemed necessary and reasonable for the protection of the fish and wildlife resources . . . ."

You were concerned that the provision of planning assistance to this corporation on the remainder of Marco Island prior to its application for Corps permits might force you into providing similar services to other developers. You were also concerned that the corporation might use a joint planning agreement with Interior and the State as a vehicle for contesting the establishment by the Trustees of the Internal Improvement Fund of

bulkhead lines at the mean high tide line in Collier County. You suggested that the quoted language in Mr. Layton's memorandum be modified to include the phrase, "within the limits set by the State."

We have reviewed this matter and do not share your concern over the quoted language in Mr. Layton's memorandum. We should be willing to provide advice to developers prior to their application for Corps permits, particularly when such assistance will be at the developer's expense. We recall that our Bureau did provide such assistance at times to developers in your Region prior to the June 1967 Agreement between the Secretary of the Interior and the Secretary of the Army. We favored this approach and understood that the Region was having a significant influence on the planning by certain developers in Florida through these efforts. The intent of the Agreement is not to discourage cooperation with developers. In fact, it emphasizes that differences of opinion on permit cases should be resolved through negotiation in the field whenever possible. Of course, there should be coordination among Interior bureaus, and our Bureau should not make unilateral arrangements with a developer which would adversely affect the interests of another bureau. We would expect that only the larger developers such as the Marco Island Development Corporation would be interested in this degree of planning assistance. Detailed investigations should not be necessary in connection with the majority of proposed developments, particularly those involving a small area. It would seem that advice on dredging and filling sites often could be given informally with a minimum of effort.

As you know, the material to be covered in the letter of intent was generally agreed to in the meeting here on February 2. Since mitigation opportunities seemed very limited in Roberts Bay under the State approved development plan, we proposed that assistance be given to the corporation in identifying areas of high fish and wildlife value on the remainder of Marco Island which should be protected and which might otherwise be destroyed. Such protection, in effect, could help compensate for losses in the Roberts Bay area.

If this Department, the State, and the corporation enter into an agreement on planning assistance in good faith, we certainly would not expect the corporation to use the agreement as a means of circumventing the bulkhead lines set by the State. We would expect the planning assistance to result in the dedication of certain areas throughout the remainder of the island for fish and wildlife protection. The establishment of the bulkhead lines at the mean high tide line does not in itself assure that areas will be set aside as wildlife habitat. For example, clean cutting of mangroves between the bulkhead lines and the waterfront would destroy the mangrove-bay relationship which provides important habitat. Preservation of certain stands of mangroves along bays and on small islands would represent a wildlife protection measure which would be in addition to the bulkhead law requirement.

The Marco Island Development Corporation has submitted a draft letter of intent which was prepared in consultation with Mr. Arthur Marshall and BCF Regional Director Seton Thompson. The draft is presently under review in the Office of the Secretary.

We shall keep you advised as to further developments in this matter.

(sgd) Spencer H. Smith

cc:
Directorate Reading File

RB:WMWhite:mhc 2/27/69

UNITED STATES DEPARTMENT
OF THE INTERIOR
OFFICE OF THE SECRETARY

Southeast Region / 404 Financial Services Bldg.
148 Cain St., N.E. / Atlanta, Ga. 30303

August 11, 1971

RESTRICTED—CONFIDENTIAL

Memorandum

To: Executive Assistant to the Secretary
Thru: Special Assistant to the Secretary (Field Coordination)

From: Field Representative, Southeast Region

Subject: Marco Island

There were several developments which have occurred recently concerning Marco Island in which the FR has participated. The Mackle Brothers, facing the need for extending two dredge and fill permits by the State of Florida, are faced with a need to compromise with Mr. Joel Kuperberg, new Executive Director of the IIF, in a major way. They have agreed to stipulations that would give up almost one-third of the acreage presently included in the entire project, south of the present Marco Island development, in exchange for an agreement by the Governor and Mr. Kuperberg that such exchange would result in a "lump sum" agreement as to approval on future dredge and fill permits required to complete the remaining project.

It was further stipulated that the State of Florida and Mr. Kuperberg would support Mackle Brothers in such discussions with Federal agencies concerning such permits when the final written document of agreement is completed (approximately 30 days from now). These stipulations also include, at the present time, disposition of the Collier-Reed tract (Unit #24), which is in the northwest corner of the project and adjacent to Rookery Bay.

One of the main reasons for such compromise by the State certainly rests with the fact that the Deltona Corporation's claim to submerged lands under the Florida law is considered superior to that of the State (see documents attached). Therefore, at this stage, Deltona Corporation and the State are tying down the details of their agreement which should be made available to us shortly.

FR, accompanied by C. Edward Carlson, Regional Director, BSF&W, Atlanta, and Tom Olds, River Basins Unit, BSF&W, Atlanta, met with Joel Kuperberg, George Gardner, Assistant to the Assistant Secretary for Fish and Wildlife and Parks, and J. Landers, attorney and counsel to the Governor, to review these developments. In order to see what estuarine values are being exchanged, Mr. Carlson suggested a biologic study by BSF&W personnel in cooperation with State biologic personnel to be accomplished during the period while the agreements are being drawn up. This is underway at the present time.

FR believes that the next point of contest will be the Collier-Reed tract (see item #16 under *Trustees* and

item #6 under *MIDC*) which map overlays indicate is not 100 percent sold by Deltona Corporation. This is a sensitive area because it is close to Rookery Bay and will raise a great deal of environmental alarm when construction begins there. It is the feeling of FR that the State will attempt to work with Interior Fish and Wildlife personnel to force further compromise in this area; however, the Mackle Brothers have indicated to the FR that they will absolutely fight any further concession feeling that they are giving up over 3,000 acres valued at over $30,000,000—a major concession. In addition, this project was accomplished according to law existing at the time it was established and has proceeded in a manner consistent with prevailing laws in Florida as they relate to land development. It is doubtful that Deltona Corporation can return all of the funds received on lots sold in the Collier-Reed tract at this time or that they would be willing to do so.

Recommendation: FR recommends that the Department join with the State *at this time* in arriving at agreements with the Deltona Corporation so that (1) the State and Interior agencies can be fully apprised of what agreements are being made; (2) that agreements made at this time should also incorporate agreements with the Federal agencies such that matters dealing with this project can be resolved in the public interest and in the interest of Deltona Corporation; and (3) that the timing of any announcements with this corporation's efforts to resolve in one agreement its future dredge and fill proposals be such that a coordinated announcement by the Secretary and the Governor of Florida be made at the same time.

Under separate cover, a complete packet of documents as received concerning developments on Marco Island is forwarded.

/s/ CLARENCE S. LORENTZSON
Clarence S. Lorentzson

Enclosures

August 20, 1971

Memorandum

To: C. Edward Carlson, Regional Director
BSFW, Atlanta, Georgia
Through: Spencer Smith

From: Assistant Secretary for Fish and Wildlife and Parks

Subject: Marco Island

On July 22, 1971, you met with officials of the Department and the State of Florida to discuss the proposed settlement for Marco Island. At the conclusion of that meeting, it was determined that the Vero Beach office would initiate an immediate environmental assessment of the proposal to determine the significance of the proposed trade-offs. As you know, the State is scheduled to reconsider the proposal August 31 before the Cabinet.

It was my understanding that the Vero Beach office would have the survey completed on all areas except Collier Reed by the end of the month and that Kuperberg would request a time extension to complete the Collier Reed portion of the survey.

I am dismayed to learn that the Bureau has yet to make its first trip to the area for the survey. I am aware that Joe Carroll was scheduled to go in yesterday and was held up on a court case in Miami; however, 28 days have already elapsed in what is supposed to be a priority effort. *I want to get Marco Island resolved.*

On September 15 you are to meet with me here in Washington with the results of the survey of *all* areas, including Collier Reed. The Department will then meet with State officials in Tallahassee on September 17 to discuss our findings.

The Governor and Mr. Kuperberg are under a great deal of pressure, and delays are not helping matters any.

The survey is to include an examination of the impacts on all areas if the developer is held to the line of MHW vs. protecting in their entirety those lands to be donated by the Mackles. This will be analagous to conducting a reconnaissance and determining benefits, etc., both with and without a project.

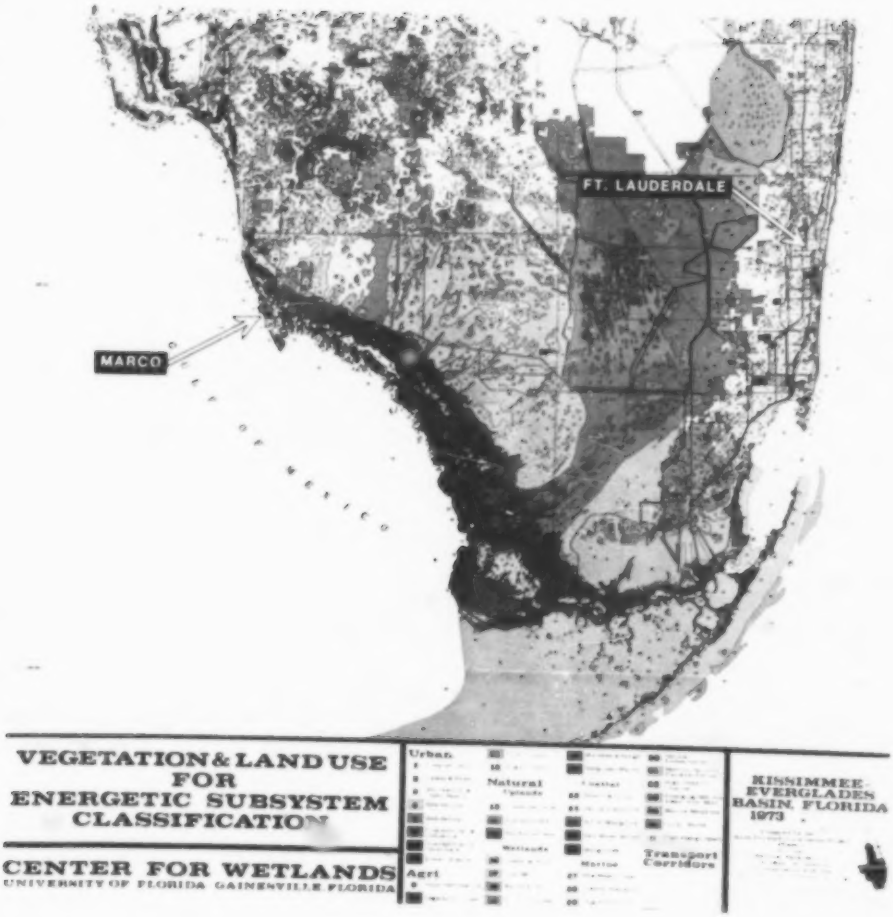
If there are any questions in your mind about what the survey includes, you should contact George Gardner immediately.

/s/
Nathaniel P. Reed

Copy: A/S chron
Gardner chron
Subject File
FW Reading
Follow-Up

GGardner: dlb

Pl. Ex. 263


FT. LAUDERDALE
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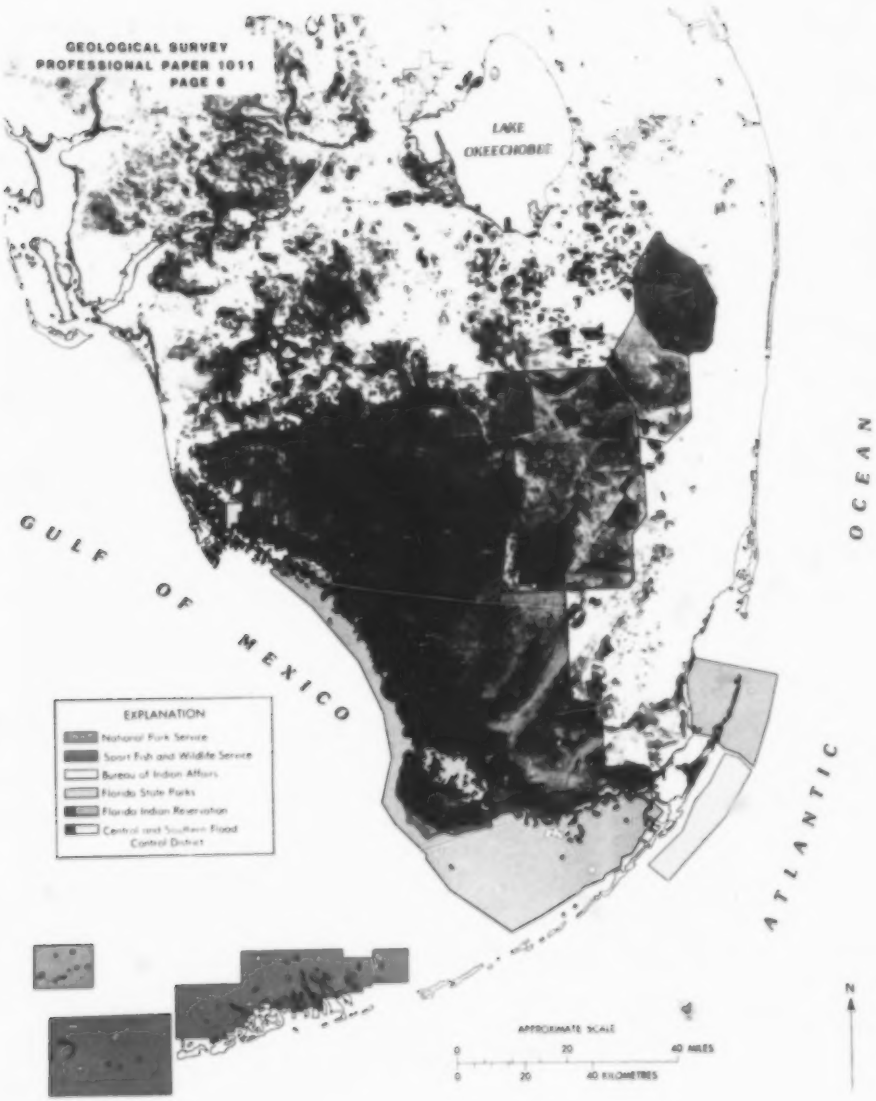
GEOLOGICAL SURVEY
PROFESSIONAL PAPER 1011
PAGE 6
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OKEECHOBEE
GULF OF MEXICO
ATLANTIC OCEAN
EXPLANATION
National Park Service
Sport Fish and Wildlife Service
Bureau of Indian Affairs
Florida State Parks
Florida Indian Reservation
Central and Southern Flood Control District
APPROXIMATE SCALE
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Pl. Ex. 338-4

Opposition

Office - Supreme Court, U.S.
FILED
FEB 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1207

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE DELTONA CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
FRED R. DISHEROON
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the government effected a Fifth Amendment taking of a portion of petitioner's property when it denied permits, required by the Rivers and Harbors Act and the Clean Water Act, to dredge and fill wetlands along the Gulf of Mexico.*

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* A related issue is presented in *James J. Jentgen, Trustee* v. *United States*, 657 F.2d 1210 (Ct. Cl. 1981), petition for cert. pending, No. 81-1168.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1207

THE DELTONA CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A-132 to A-155) is reported at 657 F.2d 1184.

JURISDICTION

The judgment of the Court of Claims was entered on August 19, 1981. Petitioner's motion for rehearing was denied on October 2, 1981. The petition for a writ of certiorari was filed on December 29, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1255(1).

STATEMENT

Petitioner brought this action seeking compensation under the Takings Clause of the Fifth Amendment after the United States Army Corps of Engineers (Corps) denied it permission to dredge in navigable waters of the United States and spread the dredged material over some 2,000 acres of wetlands (mangrove swamps) for the purpose of expanding a large residential development at Marco Island, Collier County, Florida (Pet. App. A-66, A-69, A-70). The Corps denied permission under Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, and Section 404 of the Clean Water Act, 33 U.S.C. 1344, after it concluded that petitioner's proposed development would have significant adverse environmental effects (Pet. App. A-133).

1. Since 1899, permits have been required from the Corps under the Rivers and Harbors Act of 1899 [1] for dredging and filling in traditional navigable waters. After 1972, petitioner was also required to obtain a Section 404 permit [2] from the Corps pursuant

---

[1] Section 10, 33 U.S.C. 403, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; * * * and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of, any * * * navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

[2] Section 404, 33 U.S.C. (Supp. III) 1344, provides:

> (a) The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. * * *
>
> (b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by

to the statutory requirements of the Federal Water Pollution Control Act Amendments of 1972, later amended in 1977 and now known as the Clean Water Act. [3]

In 1964, petitioner paid $7,500,000 for a 10,000-acre tract in Collier County, Florida to construct a waterfront community ("Marco Island") of 12,300 single-family homes, a larger number of multi-family units, and commercial property suitable to accommodate such a population (Pet. App. A-68, A-140). Petitioner's property "lay astride the mean high water mark and contained large areas of dense mangrove vegetation, including wetlands" (*id.* at A-140). The development plan required a complete alteration of the physical characteristics of the property: dredging canals and placing the fill material on adjacent wetlands, thereby destroying the wetlands, significantly altering open water areas, and raising the

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the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) * * *.

[3] In 1972, Congress passed extensive amendments to the Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 *et seq.*, and established for the first time a comprehensive federal program for the control and abatement of pollution of the Nation's waters. That Act was amended in 1977, and renamed the Clean Water Act. Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of dredged and fill material into "waters of the United States," 33 U.S.C. 1362(7), without a Section 404 permit. A detailed discussion of the Act and its purpose appears in this Court's decision in *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976).

level of the land to a point suitable for construction of housing (*id.* at A-70).

Petitioner divided the Marco Island project into five construction areas—Marco River, Roberts Bay, Collier Bay, Big Key, and Barfield Bay—for purposes of sequential development (Pet. 5). The project was, however, intended by petitioner to be a "thoroughly integrated, unified whole" (Pet. App. A-140).

In 1964, petitioner applied for a Section 10 permit to begin construction of the Marco River portion of the project. The Corps granted the permit on October 27, 1964 (*id.* at A-75).

In 1968, petitioner applied for a Section 10 permit for the second construction area, Roberts Bay. On December 18, 1969, the Secretary of the Army granted a permit, but imposed certain conditions (*id.* at A-75, A-76). These conditions included a warning that "all permit applications are independent of each other and that the granting of this permit does not necessarily mean that future applications for a permit or permits in the general area of the proposed work by Marco Island Development [Deltona] Corporation or others will be similarly granted" (*id.* at A-167).

By the time the Roberts Bay permit was granted, petitioner had already signed contracts for sale of over 60% of the lots in the three remaining areas (*id.* at A-80). In 1973, petitioner applied for Section 10 permits to dredge and fill in the Barfield Bay, Big Key, and Collier Bay areas. These activities also required a permit from the Corps under Section 404 of the Clean Water Act, 33 U.S.C. (& Supp. III) 1344 (*id.* at A-142).

The Big Key and Barfield Bay areas included 111 acres of uplands (property both above mean high water and not normally characterized by the prevalence of wetland vegetation species) and 2,039

areas of wetlands subject to tidal inundation (*id.* at A-66). These wetlands are covered by a dense growth of mangrove forest which provides habitat and nursery areas for a variety of marine and aquatic organisms. The mangrove forests produce detritus, which through tidal export, is the basis of the marine food chain which exists in the mangrove swamps and in adjacent water bodies, such as the Big Marco River, Barfield Bay, and the Gulf of Mexico. In addition, mangroves provide a habitat for many aquatic species and birds dependent on the estuary for food (*id.* at A-101 to A-109). They also serve as a buffer zone during hurricanes and as an aid in shoreline and bank stabilization (*id.* at A-142 to A-143). The Big Key and Barfield Bay developments would have destroyed the 2,000 acres of mangrove wetlands, and permanently damaged some 500 acres of bay bottom areas (*id.* at A-21).

On April 16, 1976, after an extensive review of the environmental effects of the proposed development, the Corps denied petitioner's applications for permits to dredge and fill in the Big Key and Barfield Bay construction areas, but granted its application for Collier Bay (*id.* at A-87). The Collier Bay permit was issued because the Corps found that insignificant environmental harm would result if that area, already partially developed, were filled (*id.* at A-143). The denial of permits for the two remaining areas was based on both (1) the wetlands policy of the Corps, 33 C.F.R. 320.4, which prohibits destruction of wetlands through dredging or filling unless such destruction is shown to be in the public interest, and (2) the Section 404(b) guidelines established by the Environmental Protection Agency, 40 C.F.R. Part 230, for the evaluation of the water quality effects of the disposal of dredged or fill material (D. Exh. 2, 6th

Indorsement).[4] The Corps concluded that there would be extreme adverse environmental effects, not outweighed by benefits of the project, if the two areas were dredged and filled in the manner proposed by petitioner (Pet. App. A-142 to A-143).

2. Petitioner then filed suit in the Court of Claims alleging that the Corps' denials of permits for the Big Key and Barfield Bay areas of its Marco Island Development amounted to a condemnation of those properties, for which it was entitled to compensation under the Tucker Act, 28 U.S.C. 1491. The trial judge concluded that a taking had occurred. He ruled that (1) "[t]o the extent that Congress invokes the commerce clause as a basis for regulating use of property * * * for purposes other than control of navigation, it is exercising the power of eminent domain * * *"; and (2) "any restriction [by Congress] upon use of property * * * not subject to [the navigational] servitude will require compensation if the restriction diminishes the value of the property below the value of its highest and best use" (Pet. App. A-56 to A-57).

The Court of Claims rejected the trial judge's recommendation, and held that no taking had occurred. The court first noted that it had before it no question about the validity of the permit denials under the Clean Water Act, the Rivers and Harbors Act, and the applicable regulations (*id.* at A-144). It also rejected petitioner's contention that any deprivation of the highest and best economic use of its land constituted a taking (*id.* at A-153).

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[4] "D. Ex." refers to Defendant's Exhibit introduced in the Trial Division of the Court of Claims. An "Indorsement" is an attachment added by a reviewer to a Corps of Engineers report.

The Court of Claims then applied the teachings of *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), and *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), and found that petitioner had neither been denied a fundamental attribute of ownership nor deprived of all economically viable use of its property. The court noted that Barfield Bay and Big Key included 111 acres of uplands, not requiring a Corps permit, with a total market value of $2.5 million. Petitioner had paid only $1.24 million for all of both areas in 1964. "Therefore," the court below concluded, "the statutes and regulations at issue in this case substantially advance legitimate and important governmental interests and do not deprive Deltona of the economically viable use of its land. Instead, Deltona's remaining land uses are plentiful and its residual economic position very great" (Pet. App. A-151 to A-152). The court was unimpressed by petitioner's claim that it had invested with the expectation that it might be allowed to develop the two remaining areas. The Corps had warned petitioner in 1969 that it might be denied future permits (*id.* at A-152).

ARGUMENT

The decision below is correct, does not conflict with any decision of this Court or any court of appeals, primarily presents only questions of fact peculiar to this case, and is not of sufficient importance to merit further review by this Court.

1. Petitioner argues that the Court of Claims erred in finding that petitioner's property retained economically viable use, because the court improperly considered Barfield Bay and Big Key together with other tracts in the Marco Island project for which

permits had been granted (Pet. 15-22). That approach, petitioner claims, is inconsistent in principle with the Ninth Circuit's decision in *American Savings & Loan Association* v. *County of Marin*, 653 F.2d 364 (1981), and with recent statements by this Court. Petitioner's claim rests on a misdescription of the Court of Claims's ruling. The challenged holding does not conflict with either *American Savings & Loan* or this Court's decisions.

a. The Court of Claims held that no matter how one defined the geographic boundaries of petitioner's property for purposes of the takings question, the property retained "enormous" "residual economic value" (Pet. App. A-151). One way to analyze the impact from the permit denials is to look at their effect on petitioner's original investment in 10,000 acres for the Marco Island project, intended from the beginning as a "thoroughly integrated, unified whole" (*id.* at A-140). From that perspective, the court found, "Barfield Bay and Big Key contain only 20% of the total acreage of Deltona's original purchase * * * and 33% of the developable lots. All the necessary federal permits for the development of the remainder of Marco Island * * * have been granted" (*id.* at A-151). If the focus were restricted to the three tracts included in petitioner's 1973 permit applications, the court held, the government had still granted "all the necessary clearances for Collier Bay, a tract approximately 25% of the three areas together" (*ibid.*). Indeed, even if Barfield Bay and Big Key were considered in isolation, the court went on, they contained uplands whose market value ($2.5 million) was twice what petitioner had paid for both tracts in 1964. Moreover, Deltona held transferable development rights for those tracts, granted by the

county, which "mitigate whatever financial burdens" the permit denials imposed (*id.* at A-151 & n.14, quoting *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 137 (1978)).[5] Finally, the court pointed out that application of the Corps' regulations elsewhere would benefit petitioner, and that " 'these benefits must be considered along with any diminution in market value' which Deltona might suffer" (Pet. App. A-150, quoting *Agins* v. *City of Tiburon*, 447 U.S. 255, 262 (1980)). The Court of Claims's factual finding about the residual value of petitioner's property is hardly an appropriate subject for this Court's review.

b. The decision by the Court of Claims does not conflict with the Ninth Circuit's decision in *American Savings & Loan Association* v. *County of Marin*, 653 F.2d 364 (1981). The Ninth Circuit there held that whether contiguous parcels of land should be considered as one for taking purposes was "a factual issue," to be decided "case-by-case." *Id.* at 370, 371. Because it was reviewing a grant of summary judgment, the court of appeals found it impossible to say whether the appellant's two tracts should be analyzed separately. It noted, for example, that "[t]he County might make some provision for density transfers or otherwise permit shifting of benefits and

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[5] In addition, the permit denials at issue do not preclude petitioner from seeking permits for other, less environmentally harmful, development of the property in question. Cf. *Penn Central, supra*, 438 U.S. at 136-137. The Chief of Engineers specifically advised petitioner that the Corps would consider other plans (D. Exh. 2, 6th Indorsement), and in 1978 petitioner submitted an alternative plan to the Corps and the State of Florida (D. Exh. 8). A final decision on the new application is expected within the next few months.

burdens between the two. See *Penn Central*, 438 U.S. at 136-37." 653 F.2d at 371.[6]

The court did say that under some circumstances, where the county took the initiative in subjecting adjacent parcels of land to different zoning restrictions, two tracts might be considered separately for condemnation purposes. *Id.* at 371-372. Applying that theory to this case would not change the results. In the first place, as we have just noted, the Court of Claims held that even if the land for which permits were denied was considered in isolation, it retained "enormous" "residual economic value" (Pet. App. A-151). Thus, the single/multiple parcel issue is irrelevant to the success of petitioner's case. In the second place, the federal government's treatment of the entire Marco Island project is quite unlike the situation hypothesized by the Ninth Circuit. The government has not applied two different sets of rules to two adjacent portions of petitioner's property. The legal requirements of Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act apply uniformly to each area—indeed, to all such property anywhere in the United States. *American Savings & Loan* recognized that where "the entire subject property [is] covered by a uniform restriction" (653 F.2d at 369), and the regulation attacked applies to large areas of land (*id.* at 371 n.6), it is inappropriate to treat a tract technically susceptible of further division as separate parcels of property for taking purposes. The petitioner's present predica-

[6] That is precisely what occurred in this case. Deltona held transferable development rights from the county for Barfield Bay and Big Key, which it could sell or use to increase unit densities elsewhere in the Marco Island project (D. Exh. 15, Addendum).

ment has resulted from its own decision to carve its property into five pieces, and to proceed with development and seek permit applications sequentially. Certainly Congress was under no obligation to postpone passage of the Clean Water Act until all phases of the Marco Island project were completed.

c. The holding of the Court of Claims is consistent with recent decisions by this Court. The petitioner's argument that Barfield Bay and Big Key must be considered in isolation conflicts with the direction of this Court in *Penn Central*, *supra*, 438 U.S. at 130-131:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses * * * on the * * * interference with rights in the parcel as a whole * * *.

Petitioner claims, however, that *Penn Central* is distinguishable because it involved a vertical rather than a horizontal division of property rights. *Penn Central* addressed that contention too (*id.* at 130):

> Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, * * * but also in approving those prohibiting both the subjacent, see *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962), and the lateral, see *Gorieb* v. *Fox*, 274 U.S. 603 (1927), development of particular parcels.

Nor is there any support in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621 (1981), for petitioner's position. In that case the city rezoned 214 acres of a 412-acre parcel owned by the appellant,

who then sued for inverse condemnation. This Court merely held that the decision by the California Court of Appeal was not a final judgment reviewable under 28 U.S.C. 1257. Even the dissent, upon which petitioner relies (Pet. 20 n.21), specifically stated that it did not reach "the issue whether San Diego's course of conduct *in fact* effected a 'taking' of appellant's property." 450 U.S. at 661 n.27 (emphasis in original).

Finally, *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), contradicts rather than supports petitioner's claim. The *Kaiser Aetna* litigation presented two questions: (1) whether the petitioners had to obtain permits under Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, "for future construction, excavation, or filling" of a pond within the Hawaii-Kai development; and (2) whether the United States could require petitioners to allow public access to the pond. 444 U.S. at 168. With respect to the first issue—the closest analogue to the question here—the district court found for the government. 408 F.Supp. 42, 53 (D. Hawaii 1976). Its decision was affirmed by the court of appeals, 584 F.2d 378, 381-383 (9th Cir. 1978), and was not challenged in this Court. 444 U.S., *supra*, at 169-170 n.3. Perhaps a different question would be presented here if the Court of Claims had allowed free public use of Barfield Bay and Big Key, but that simply did not happen.[7]

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[7] *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928), also cited by petitioner, is equally irrelevant. *Nectow* did not even consider the question of the divisibility of land for compensation purposes. Rather, it held on substantive due process grounds that splitting Nectow's land into two different zoning districts was an arbitrary exercise of state power. *Id.* at 188-189.

2. Petitioner also asserts that the government is attempting to preserve wetlands through regulation rather than purchase, in violation of the Fifth Amendment (Pet. 22-25). Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), forbids the discharge of pollutants such as dredged or fill material into the waters of the United States (including wetlands, 33 C.F.R. 323.2(a), (c)), unless a permit has been obtained. It is true that petitioner was denied a permit to dredge and fill in Barfield Bay and Big Key, and that the government could also have prevented environmental harm on those tracts by purchasing them. But "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922). See *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979).

In deciding the "essentially ad hoc, factual" question whether a regulation is so intrusive that it requires compensation, this Court has identified several factors to be considered. *Penn Central*, *supra*, 438 U.S. at 124. These include the economic impact on the property, including interference with investment-backed expectations, and the character of the challenged governmental action. In this situation the inquiry hardly needs to go beyond the first step, for as the Court of Claims found, the petitioner's property for which permits were denied retains "enormous" "residual economic value" (Pet. App. A-151). All that petitioner can point to is an "instance of some diminution in value" (*id.* at A-152), which according to settled precedent is insufficient to support a takings claim. *Penn Central*, *supra*, 438 U.S. at 131.

Petitioner asserts that it has been unconstitutionally deprived of a still greater return on the property because of its investment-backed expectation that it would be permitted to construct a residential development on Barfield Bay and Big Key (Pet. 9-14). But "perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979). And, as the Court of Claims found, the Corps of Engineers warned petitioner in 1969 that "future applications for * * * permits in the general area of the proposed work by [Deltona]" would not necessarily be granted (Pet. App. A-152). The court concluded that petitioner itself was at fault for rushing into sales contracts before obtaining the necessary federal permits (*id.* at A-154).[8]

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[8] Petitioner suggests that the Court of Claims misconstrued the cover letter accompanying the Roberts Bay permit in 1969, in which Deltona was told that "future [permit] applications" would not necessarily be granted (Pet. 9-11). Petitioner emphasizes a paragraph (Condition "cc") following that warning, in which it promised not to sell land below bulkhead lines fixed by the state. Petitioner fails to point out that by that time it had already sold 60% of the lots in the Big Key, Barfield Bay, and Collier Bay areas (Pet. App. A-80). Moreover, permission to sell the land hardly entails authority to dredge and fill the land, particularly in light of the preceding paragraph, which explicitly says that permits to do so may not be granted. In any event, petitioner is precluded from relitigating this question, which was fully litigated and finally determined by the district court in petitioner's action challenging the legality of the permit denials under the Administrative Procedure Act. *Deltona Corp.* v. *Alexander*, 504 F.Supp. 1280, 1285-1286 (M.D. Fla. 1981), appeal pending, No. 81-5226

If one looks to the character of the challenged governmental action, the conclusion that petitioner has suffered no taking becomes even more compelling. The Court of Claims found that the Marco Island development "lay astride the mean high water mark," and that its "dredge and fill activities were to take place in 'navigable waters' " covered by the Rivers and Harbors Act and the Clean Water Act (*id.* at A-140 to A-141).[9] Not only is it true that the navigable waters of the United States are the "public property of the nation, and subject to all the requisite legislation by Congress," *Gilman* v. *Philadelphia*, 70 U.S. 713, 725 (1865); but "[m]ore importantly for the present case, * * * [where] 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." *Penn Central*, *supra*, 438 U.S. at 125. See also *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915).[10]

(11th Cir.). See *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979); *Restatement (Second) of Judgments* § 68 and Comment *b* (Tent. Draft No. 1, Mar. 28, 1973).

[9] Petitioner's claim that "[v]irtually all the real property at issue is 'fast lands,' *i.e.*, property landward of the mean high water line" (Pet. 7), simply has no foundation in the facts found by the Court of Claims.

[10] Because of its disposition of the taking question, the Court of Claims found it unnecessary to consider the government's claim that petitioner did not even have a property interest at stake, given the federal navigational servitude (Pet. App.

Given the enormous economic value petitioner's property retains, the clear warning it received from the Corps to limit its expectations for development, and the character of the challenged governmental action, the ad hoc, factual question about the impact of the permit denials is not one which warrants review by this Court.

3. This case is especially inappropriate for review at this time in light of the related litigation which petitioner has pending in the Eleventh Circuit. Soon after petitioner was denied permits to dredge and fill in Barfield Bay and Big Key, it filed an action in federal district court challenging the legality of the permit denials under the Administrative Procedure Act, 5 U.S.C. 701-706. On January 14, 1981, the district court ruled that the Corps of Engineers had acted reasonably and lawfully in denying the permits. *Deltona Corp.* v. *Alexander*, 504 F.Supp. 1280 (M.D. Fla. 1981). Petitioner's appeal from that decision is now pending in *Deltona Corp.* v. *Alexander*, No. 81-5226 (11th Cir.). Although the government contends that the district court's determination should be upheld, a contrary ruling on appeal would render petitioner's claim of inverse condemnation moot.

A-155 n.15). But of course the court could not, and did not, fail to take account of the fact that petitioner's dredging and filling operations would take place in and affect navigable waters. That fact is relevant both because it accents the importance of the challenged governmental action, and because it diminishes the empirical expectations of petitioner about the possibilities of developing its property.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 367512 817